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REPUTATION OF THE AMERICAN COURTS ABROAD.

THE London Law Magazine, in its August number, contains a highly complimentary notice of the treatise on the Law of Carriers, recently submitted to the profession by Mr. Angell. During the brief period which has elapsed since it was issued, Mr. Angell's work has acquired so deservedly high a reputation, that it would seem supererogatory to reprint its trans-atlantic commendations. Suffice it to say, that such a notice from such a journal is one of which any writer, English or American, might justly feel proud.

Our attention, however, has been more especially called to the honorable mention which is made of the American courts in the following extracts: —

"We consider it a great recommendation of this work, that it contains a body of decisions by the different courts of America, on the several subjects of which it treats. They are added to the decisions of our English courts on this subject, and they will not suffer by comparison. The greater part of the judgments delivered by the judges in America exhibit vigorous, acute, and sound reasoning, and an intimate familiarity with all the cases, both in England and in America, which have decided, or can assist in deciding, the question before them.

We are persuaded an English advocate will find in these judgments much to assist him in discussing before an English tribunal the subjects involved in those judgments. We know they cannot be quoted in an English court as authorities, but the day is past when a judge would interrupt a counsel who was citing a foreign writer as affording an illustration of the principle for which he contended. We can recollect

the noble and learned lord, who presided on the trial of Col. D'Espard, interrupting Mr. Sergeant Best, who in his defence cited a powerful passage from the writings of Montesquieu. We have too high an opinion of the enlarged and enlightened minds which are to be found on the benches of our superior courts, to doubt their readiness to receive assistance from cultivated and enlightened judges, in whatever part of the world they administered justice. It may be added, that the very frequent intercourse by water between different parts of the extensive territories of the United States, in addition to the great intercourse between the United States and distant foreign states, has perhaps furnished a greater variety of questions and more numerous decisions on the duties and liabilities of carriers by water, and the rights and remedies of passengers, than have arisen in England: hence from those decisions much valuable assistance may be derived."

In the September number of the Law Reporter, we published an article, for which we were indebted to a highly accomplished member of the Suffolk bar, upon "The Bench and the Bar in England." This gentleman, having recently returned from that country, disclosed to us, as the result of his acquaintance with professional gentlemen abroad, that there existed everywhere a prompt disposition to recognize the claims of American jurists and jurisprudence. It is, perhaps, a sign of weakness, to collect all the kind notices which can thus be gleaned, but the weakness is common to all nations, and an American traveller's account of Europe is as eagerly devoured abroad, as a European's account of America is sought for at home. "What do they think of us?" is the question of universal and intense interest. We therefore hope that our readers will pardon a few reflections, suggested by the article in the Law Magazine, upon the value of a knowledge of American law to the lawyers of the old countries.

The principal value of legal reports and elementary treatises will depend upon the intellectual power of judges and authors, and upon the perfectness of their education. In a new country, there cannot be that division of intellectual labor, which is essential to proficiency in a single department. We have recently referred in the Reporter to the time when the attorney general of Massachusetts was an apothecary. A successor in the same office had not only been a practitioner of medicine, but a successful popular preacher! And it is within the recollection of the present generation, that many were elevated to posts of judicial dignity in this commonwealth, who had little or no knowledge of the theory or practice of law. If we consider, moreover, the organization of the "Great and General Court of the Massachusetts," whose authority was at the same time ex-

ecutive, legislative, and judicial, and whose composition depended in a great measure upon the whims and caprices, which excited a most excitable population at the time of their annual election — if we remember, also, how completely subservient this tribunal was to the ecclesiastical organization of the puritans, so that the administration of justice was regarded almost as a system of church discipline, we cannot but wonder that the community should ever, under any political changes, have so far outgrown their early habits as to tolerate among them an educated body of lawyers. To a certain extent, the early prejudices of Massachusetts survive. When Governor Endicott indignantly tore the red cross from the English flag, upon learning that the king was about to send over a magistrate, who should dispense justice upon the principles of equity, he only manifested, with the violence of his nature, the same determined spirit, which animates the yeomen of this commonwealth, year after year, to resist the adoption of a system of chancery practice.

This state of things is perhaps peculiar to Massachusetts. We have digressed a little to explain the difficulty which has always existed here to the organization and elevation of the lawyers as a distinct profession. It may be better that it is so. Of that we are not to speak. It is enough to say that there never has been, and never can be, in this commonwealth, the same inducement for a lawyer to be merely a lawyer, as in England. Nor has the profession ever enjoyed as independent an existence as in some other states. In Virginia, and in New York until recently, the old common law system has obtained with all the English strictness. It was necessary, therefore, that a body of gentlemen should be educated with greater care. But under these circumstances, partly because ours is a new country, and partly because it is a republic, it is impossible that our lawyers should be mere lawyers. They have not been so. Parsons and Story in Massachusetts, Jay and Hamilton in New York, Pinckney and Wirt in Maryland, Jefferson and Marshall in Virginia, — we name a few only of the illustrious dead, — were not mere lawyers. If a republic needs a refined and independent bar, and surely it does, it cannot discharge them from their duties as citizens. It is upon them that the state must call in the hours of its greatest trial, for coöperation and advice. So has it been in the United States. Some of the

most brilliant and useful men in her councils and her camp have been the most successful members of her bar.

But it does not follow, because the prominent lawyers of this country lack, to some extent, that perfect training which is to be secured by long and constant practice, that the results of their labor are less valuable to their European brethren. Mr. Burke has said that "government is a contrivance of human wisdom to provide for human wants." The administration of justice must also depend upon practical wisdom. For its recorded precepts, the discriminating judge must look not merely to those who have analyzed the principles of justice, in cloistered seclusion, by artificial aid, and with an almost mathematical precision, but to those also who have toiled in the great highway of humanity, who have withstood the heat and dust of the day, who have vindicated by the experience of daily life the purity of the principles which they expound, and their wise adaptation to the wants of mankind. A nation may be known by its laws. It is not by manifestoes and pompous declarations that it can vindicate itself to the world; but it is by exhibiting, in the silent and certain operation of its laws, a respect for justice and good order. Neither does a nation exert a legitimate influence upon the progress of the world, by mere declarations, but rather by the influence of its laws, and the respect which they secure. Let us therefore hope that the respect which has been secured abroad for the laws and lawyers of republican America, may impress upon the statesmen of Europe the practicability of republicanism, — the fact that liberty and law are essential to each other.

But apart from such speculations, we may safely add that an English lawyer may obtain information of great practical value from the volumes of American law. The learned writer in the Law Magazine has already alluded to this. The illustrations to be derived from the daily experience of such a country as our own, with its extended commerce, and its energetic population, cannot fail to be valuable to those who consider the law of carriers. But it is not in this branch of the law merely that such illustrations will be valuable. In all questions involving a conflict of laws, much may be gathered from the experience of our courts, which daily consider questions arising between citizens of distinct sovereignties, whose commercial relations are not impeded by custom-house regulations, or by the possibility of any

other than amicable relations. It was, in fact, the peculiar importance which attached to this class of questions, on account of the constitution of our confederacy, which induced the late Mr. Justice Story to prepare his valuable treatise. Many other instances might be cited in which, from the nature of our political organization, and the character and pursuits of our citizens, valuable information might be obtained by such of the bar abroad as will condescend to examine "American books." Most especially, however, should we think that upon all subjects, in regard to which the liberalizing spirit of commerce tends to wear off the harsh edges of the old common law, the salutary influence of American experience might be felt. In our relations with foreign countries, we imitate their policy and skulk behind tariffs and navigation laws. But within our own boundaries, including an area almost equal to that of Europe, a population as diversified as its different nations, and local institutions as various as the physical character of different portions of the country, there exists a system of perfect commercial freedom, and the security of perpetual peace. The result is, that the grand machinery of finance and commerce is developed to an extent before unknown. To its perfect operation, a complete system of commercial jurisprudence is indispensable.

Recent American Decisions.

Supreme Court of Vermont, Rutland County, February Term, 1849.

WILLIAM MANLY *et al. v.* FRANCIS SLASON *et al.*

The vendor of real estate has a lien for the payment of the purchase-money, not only against the purchaser, but against all privies in estate, and all subsequent purchasers and incumbrancers with notice of the non-payment of such purchase-money.

If the purchaser insist upon a waiver of the lien, it is incumbent upon him to show that such was the agreement, or understanding of the parties, or the contrary will be inferred.

In general, taking an independent collateral security is evidence of such waiver.

Knowledge that some portion of the purchase-money is unpaid, without knowing how much, or how it is secured, is sufficient to put a subsequent purchaser on inquiry.

THE facts of the case appear from the opinion delivered by

REDFIELD, J.— The principal question discussed in the present case, is, how far the vendor of real estate has a lien, for the purchase-money. It was said, in argument, indeed, that the bill, in this case, was not appropriate to any such redress. But all the facts, necessary to the creating such a right, being alleged in the bill, and the prayer of the bill being consistent with such relief, we do not think the fact, that redress was primarily sought upon another ground, any obstacle to the relief now asked. And as the only ground of relief, upon which the plaintiff could prevail, is that of the vendor's lien for the purchase-money, we come at once to its consideration.

There can be no doubt, that the existence of such a lien is among the settled doctrines of the English chancery. That has long been a conceded point. And it seems now to be equally well settled in the English courts of chancery, that the vendee of real estate, after paying the purchase-money, acquires a lien upon the estate, before its conveyance, as against all but *bonâ fide* purchasers, without notice. This limitation attaches to the lien of the vendor for the purchase-money also. (2 Story Eq. Jur. § 788, 789, 1217, and following sections and notes.) The subject will also be found fully and thoroughly discussed and digested by Judge Metcalf, in his edition of Yelverton, in a very elaborate and valuable note to the case of an hostler, p. 66. It will hardly be necessary to advert, in detail, to the numerous decided cases upon this subject, in the English books. There has been constant discussion there, as to what shall amount to a waiver of such lien. Indeed, that has been a difficult subject, in the English courts, as to all liens. The note of Judge Metcalf is addressed principally to the elucidation of that point. It is there shown very clearly, that the English cases, which attempted to make out that a waiver of the lien occurred in every case where any special contract as to the price was made between the parties, even as to the time of payment, was untenable and subversive of the very basis of all liens, that is, security to the creditor. It is undoubtedly true, that in order to have a special contract amount to a waiver of a lien, it must be to some extent *inconsistent with the continued existence of such lien*, and thus show a virtual

understanding between the parties, that the lien shall be waived. We should not be prepared to say, that this lien depended upon the contract, or the probable expectation of the parties, in the outset. For if that rule were to be adopted, there would remain few cases to which the rule would apply, as said by WALWORTH, Ch., in *Fish* v. *Howland*, (1 Paige, 20.) For if the vendor supposed there would be any necessity to resort to such lien, he would ordinarily take a formal mortgage. And it is no doubt true, that many of our citizens are wholly uninformed of any such lien, and the same is no doubt true of many other rights, which nevertheless exist, by way of lien, as the right to refuse to deliver goods sold, until the price is paid, and the right to stop them, *in transitu*.

The doctrine of lien does not depend at all upon any supposed express contract of the parties, or upon any implied understanding, unless it is in regard to the *waiver* of such liens, but upon custom, usage, and general law. And when it exists, it is not essential that it should have been in the contemplation of the parties; for if so, each case must be decided upon its own circumstances, and the right of a taverner, or manufacturer, to the security of a lien, would depend upon his knowledge of the law, and his want of confidence in his customers. These liens, as a general thing, are intended for the better security and encouragement of particular classes of trade and business, and are in fact *most* important, in those very cases, where the creditor finds his debtor unworthy of that full confidence which had been incautiously, perhaps, extended to him, and also to prevent the necessity of constant inquiry into personal responsibility in small matters. Liens in general are important for the encouragement of business, and, to answer that end, must depend upon *general law*, and not upon each particular case. So of the lien in this particular class of cases, its foundation exists in the general principles of equity and moral justice, by which the seller is entitled to hold on upon the estate, until he gets the price; and to answer its main purpose, it must be general and uniform, unless waived. These principles are distinctly recognized in 2 Story Eq. Jur. p. 465, 466, § 1220 *et seq.*; *Gilman* v. *Brown*, (1 Mason, 212); *Hughes* v. *Kearney*, (1 Sch. & Lefr. 132.) Lord Redesdale, chancellor, says, an attempt to hold the estate without the payment of the purchase-

money, is "*primâ facie* a fraud; it would lie on him to show it was not a fraud. So it lies on the purchaser to show that the vendor agreed to rest on the collateral security, *primâ facie* the purchase-money is a lien on the lands."

In *Macreth* v. *Symmons*, (15 Vesey, p. 349,) Lord Chancellor Eldon says, after an elaborate review of the authorities, from the case of *Hearn* v. *Botelers*, (Carey, 25, downwards,) in regard to this subject: "From all these authorities the inference is, that, generally speaking, there is such a lien." In *Garson* v. *Green*, (1 Johns. Ch. R. 308,) Chancellor Kent says, "*Primâ facie* the purchase-money is a lien on the land, and it rests on the purchaser to show, that the vendor agreed to rest on other security." The lien of partners, and through them of the partnership creditors, depends in no sense upon the knowledge or the expectation of the parties, and so of almost all constructive or implied trusts, or liens.

It is then incumbent upon the defendant, in a case like the present, to show either an express or implied waiver of this lien. What shall amount to such waiver is not fully settled, perhaps. In the Roman law, from which the chancery courts, no doubt, derived this notion of giving the vendor a lien for the purchase-money of real estate, the mere taking of a security of the vendee, for the purchase-money, is a waiver of the lien; but in equity, such security, even by way of a bill endorsed by a third person, is not, of necessity, a waiver, even although secured to be paid at a future day, or not until after the death of the purchaser. And this lien is good against all subsequent purchasers and incumbrancers, with notice, that the purchase-money remains unpaid. (2 Story Eq. Jur. 473, 474, 476, § 1225–1228, and notes and numerous cases there cited, both English and American.) But, perhaps, it may be considered as now settled, that the taking of security, beyond that of the vendee, whether personal, or by way of mortgage upon the same or other real estate, or by pledge or mortgage of personal estate, either for the whole or part of the purchase-money, will ordinarily be esteemed sufficient evidence of a waiver of the lien, although by no means conclusive. One of the strongest cases to be found in the books, in favor of maintaining this lien, is that of *Winter* v. *Lord Anson*, (3 Russell, 488,) before Lord Lyndhurst, 1827, reversing the decision of the vice-

chancellor, (S. C. 1 Simons & Stewart, 434,) The rule laid down by Lord Lyndhurst, is, that although the purchase-money was secured by the bond of the purchaser, and to remain so. during the life of the vendor; and although the conveyance expressed, *that the purchase-money had been paid, and the vendor's receipt, to that effect, was endorsed on the conveyance*, still that the lien upon the land continued until the bond was paid. If I were to form an opinion of the probable intention of the parties, in regard to the waiver of the lien, from the facts in the case, which indeed should govern, I should certainly quite as much incline to the opinion of the vice-chancellor, Sir John Leach, as to that of the chancellor. But we are not aware that the decision of the chancellor has been seriously questioned, although it is, no doubt, carrying the doctrine to its utmost verge. There is nothing in the present case which we could in any sense consider a waiver of the lien. And no question can be made, that the defendants Ormsbee must be affected with constructive notice of the non-payment of the purchase-money. The deed of the premises contained an express provision, that defendant Ormsbee shall pay to Slason *the amount then due to the orator for the purchase-money*, which would be sufficient to put Ormsbee on inquiry *how much*. Indeed, Ormsbee admits, in his answer, that he expected some portion of the purchase-money remained unpaid, but how much, and how it was secured, he did not know. This is just that kind of notice which should have put him upon inquiry.

But the defendants have made a chief reliance, in the argument, upon the proposition, that the doctrine of equitable liens, in favor of the vendor of real estate, was not applicable to our laws, and should not be here enforced. It is true, no doubt, that the existence of any such lien has not very generally been regarded by the parties to contracts of that kind, in this state. It has not before, to our knowledge, been brought before this court. But there can be no doubt, we apprehend, that it is a highly equitable doctrine, and eminently consistent with the most perfect notions of moral justice. It has existed in the English equity courts for centuries. It has been adopted in most of the American states, whose equity systems may be regarded as at all settled, and in the national courts. *Ross* v. *Whitson*, (6 Yerger, 50); *Outlaw* v. *Mitchel*, (4 Bibb, 239);

Ewbank v. *Reston*, (5 Munro, 287); *White* v. *Casanave*, (1 Har. & John. 106); *Ghiselin* v. *Fergusson*, (4 Id. 522); *Graves* v. *M'Call*, (1 Call, 414); *Galloway* v. *Hamilton*, (1 Dana, 576); *Hundley* v. *Lyons*, (1 Munf. 342); *Wynne* v. *Allston*, (Dev. Eq. 163); *Henderson* v. *Stuart*, (4 Hawkes, 256); *Watson* v. *Wells*, (5 Conn. 468); *Greenup* v. *Strong*, (1 Bibb, 590); *Meeks and heirs* v. *Ealy*, (2 J. J. Marshall, 330); *Voorhies* v. *Justone*, (4 Bibb, 354); *Garson* v. *Green*, *supra*, *Bailey* v. *Greenleaf*, (7 Wheaton, 46, 50.) And the same principle is again recognized by Mr. Justice McLean, in *McLearn* v. *McLellan*, (10 Peters, R. 625,) and numerous other cases might be cited.

That the existence of these liens is inconsistent with our registry, or attachment laws, is an objection no more formidable than exists from the same source against most constructive, or implied trusts and liens, existing in or growing out of the numerous equitable rights, peculiar to real estate, and which have nevertheless been regarded and enforced, in this state, upon the settled principles of the English chancery. An absolute deed of land, with a parol defeasance, for the security of a debt, is of this character. So are all resulting trusts, in favor of the person paying the consideration-money for a deed of land, executed to some third person. And this right has been enforced in favor of a married woman even, *Pinney* v. *Fellows*, (15 Vt. R. 525,) where the whole subject of resulting trusts is very elaborately and satisfactorily discussed, and the authorities, bearing upon that point, learnedly digested by BENNETT, J.

Any argument, which is attempted to be drawn from the statute of frauds, is equally applicable to the English statute. But many cases, coming, in terms, within that statute, have been saved from its operation by courts of equity. Such are cases of part performance of the contract, the deposit of title deeds, to secure a debt, &c. The payment of the price of land, before the execution of the conveyance, and the execution of the conveyance, without the payment of the price, as well as the execution of an absolute deed, for the security of a debt, and all resulting trusts, and many others, are of this character. It has been urged, that the existence of such a lien will unreasonably clog the free circulation of property, and that it is otherwise inconsistent with our habits of business, and modes of

conveyance. But such an objection, if, indeed, it be properly comprehended by the court, seems far too uncertain and indefinite to form any just ground of decision in a court of justice. We, however, apprehend no serious embarrassment will result to the community from the determination here made. This lien can only be enforced in a court of equity, where all equitable considerations will be open to both parties. The cases will be free, and to entitle the plaintiff to redress, he must show a case of manifest equity, in proof, and in principle. In my judgment, such a rule is far less in danger of being abused to the public detriment, than are stringent rules of law, enforced with an iron hand, through fear of relaxation. But I am not specially fearful of the abuse of the law, from rigid adherence to principle, as evolved from the decided cases. There is in our day, perhaps, more danger of too great and sudden departure from the ancient landmarks of the sages of the law, which have been long tried, and become easy and comfortable, in pursuit of the *ignes fatui* of modern progress and innovation. We should not have felt called upon to say any thing upon this portion of the case, had it not been for the great zeal and evident sincerity with which these considerations were pressed upon the court.

H. N. Territt *et al. v.* Benjamin P. Bartlett.

The statute of Vermont prohibits the sale of spirituous liquors, except under license to sell for certain specified purposes. Therefore, a firm doing business in the city of New York, and who, in the state of Vermont, made a contract with an innkeeper, to forward him, by common carriers, spirits, which they knew he intended to sell in violation of the laws of Vermont, cannot recover the price of such spirituous liquors in the courts of Vermont.

The important facts are disclosed in the opinion of the court.

Linsley & Harrington, for plaintiffs.
Briggs & Williams, for the defendant.

Redfield, J. — This is an action to recover of defendant the price of spirituous liquors. The contract of sale was closed, between the parties, at Brandon, in this state. The liquors were to be consigned by the plaintiffs, who were merchants in the city of New York, to the defendant, who was an

innkeeper at Brandon, to be landed at Orwell, marked "B. Brandon, Vermont." The plaintiffs, at the time of making the contract, knew that the defendant intended to retail the liquors in this state, without a license, and that this was in violation of the statute law of this state. The member of plaintiffs' firm, who made the contract with defendant at Brandon, immediately upon returning to New York, caused the liquors to be forwarded to defendant, as agreed. The question is whether, upon these facts, the plaintiffs are entitled to recover the price of the liquors, in the courts of this state.

If this were clearly the case of a sale and delivery, in this state, the question would admit of no doubt whatever. But the delivery, for most purposes, is to be regarded as complete in the state of New York, unless the plaintiffs paid the freight, which does not appear. There is, indeed, a class of English cases, which have attempted to show a distinction between mere revenue laws, and those laws which have for their object the protection of the public morals, or the preservation of good order and fair dealing, allowing an action to be maintained upon contracts made in contravention of some specific revenue or excise regulation, upon the supposed intention of the legislature not to visit the consequences of a violation of such particular laws upon the offender, beyond the specific penalty provided by the statute. Of this class are *Hodgson* v. *Temple*, (5 Taunton, 181. 1 Eng. Com. Law R. 67); and *Johnson* v. *Hudson*, (1 East, 180); and *Brown et als.* v. *Duncan*, (10 B. & C. 93. 11 Eng. C. L. R. 31.) Whether this distinction is to be considered as having any just foundation, in sound reason and good principle, or whether in fact it can be treated as fairly established in the English courts, it is perhaps not important to inquire here. It seems to me very obvious, that no such distinction can be maintained, upon the basis of any fair and sound argument. The case of *Brown* v. *Duncan* has certainly been very often questioned by the English courts, and is placed among cases "doubted," by Professor Greenleaf, in his Collection, p. 56, where numerous English cases are referred to, in which that case has been treated as unsound. And the same may, with justice, be said of *Johnson* v. *Hudson*. See the opinion of LITTLEDALE, J. in *Brooker* v. *Wood*, (3 Neville & Manning, 96.)

But it is impossible for this court to regard the statutes of

this state, prohibiting the sale of spirituous liquors, except with licenses, as merely or principally revenue laws. These statutes have been the subject of great study and much experiment, in the legislature, but with no view to increase revenue, but exclusively almost for the purpose of more effectually repressing and preventing intemperance and disorder in the community. I do not myself intend to say, of every sale of spirits, or wine, to persons in health, and for their own use, that it is, aside from the statute, reprehensible or immoral, either in the seller or the purchaser. I do not yet feel prepared to say, that such a declaration is clearly consistent with sound sense and wise experience; but there is no manner of doubt that the common and unrestricted sale and use of spirits and wine, has caused a vast deal of poverty, immorality, and crime, so that the subject of its sale and use may be said fairly to come within the legitimate power of the legislature, in regulating the administration of the internal police of the state. And we think that the penalties and prohibitions of the statutes, upon this subject, have a primary and principal reference to the quiet and good order of the community, and that revenue was intended to be merely incidental to the main purpose sought to be effected. How much, indeed, it will be found practicable to accomplish, in this way, is a subject for the legislature and the people, and with which courts have really no concern. Every good citizen would hope for the best, and he would have the right to expect not to be subjected to the ostracism of public opinion, if he feared the worst. The indications are now favorable; and if they were less so, the statutes would require to be fairly enforced, notwithstanding.

A contract, then, which has for its object, or which contemplates any act prohibited by express statute, or the commission of which incurs a penalty, is as much illegal and void, as if the statute in express terms so declared. Hence all spirits sold here, in violation of the license laws, can never form the basis of a recovery in our courts. But in a case precisely like that of *Holman* v. *Johnson*, (1 Cowper, 341,) where the sale and delivery were both made in another state, and the seller did nothing to further the illegal object, except what was necessary to pursue his own lawful business, in the foreign state, although he might have known the illegal purpose contemplated by the vendee, I should have no doubt an action would lie in our courts.

It might fairly be said, that the mere knowledge of the illegal purpose of the vendee, is something which the vendor could not avoid; and, at the same time, something which he could not regard without prejudice, and unjust prejudice, to his own lawful business, and that out of regard to the law of a foreign state, which, properly speaking, could have no extra-territorial force. It would be, then, wholly consistent with the most scrupulous regard to duty and morality, for one to make such sale in the lawful pursuit of his own business, in his own country, and this is all that the case of *Holman* v. *Johnson* decides. But this reasoning will not apply to the case of a sale made here. And this is a case which comes up to the utmost limit of sound doctrine. And so it has been considered in the English courts. *Briggs* v. *Lawrence*, (3 T. R. 454.) This is the case where the vendor of brandy, in *Germany*, packed it in ankers, in preparation for smuggling, and it was held, he could not recover the price, because he was thus implicated in the unlawful purpose. What is done abroad, beyond the mere business of the vendor, and specially to further the illegal design of the vendee, was justly referable to the place where the unlawful design was to be accomplished, and so is a violation of the law of that state, although transacted in the foreign country. This is made very obvious from the simple illustration of principals and accessories in crime. It has been held, that one may be even the principal in a case of uttering forged paper, who never came within the state, by merely putting it off, through the instrumentality of the post-office. So, too, it has always been held, that one who in one county commits or aids in the commission of crime in another county, is an accessory to the crime in the other county, and may be tried and punished there; and if he commit the crime, through the instrumentality of an innocent agent, he is a principal in the crime in the county where it is committed, although never present there.

The rule upon this subject is, we think, correctly laid down in *Langton* v. *Hughes*, (1 M. & S. 593.) Lord Ellenborough says, "Without multiplying instances of this sort, it may be taken, as a received rule of law, that what is done in contravention of an act of parliament, cannot be made the subject-matter of an action." This was the case of drugs sold to a brewer, *with the knowledge that they* were intended to be used, in brew-

ing, contrary to the provisions of the statute. For this merely the seller was considered a participator in the illegal purpose, and it was considered unimportant, whether the drugs were in fact put to the illegal use, or not. This case has never been doubted, but always followed. *Canaan* v. *Bryce*, (3 B. & A. 187.) The rule laid down by Chief Justice Eyre, in *Lightfoot* v. *Tenant*, (1 B. & P. 551,) that one who sells goods, *in the place of the forum*, knowing they are intended to be put to an illegal use there, cannot recover the price, although going perhaps somewhat beyond the case now before us, has been approved and followed, and may now be considered the settled law upon the subject. This rule was distinctly recognized in this court in *Case* v. *Riker*, (10 Vt. R. 482.)

In the present case, for all practical purposes, the contract of sale must be considered as made in this state, and it cannot be disguised that the defendant had for his main object the procuring of materials to be used in the violation of an express statute of the state, and in this object the plaintiffs were participating, countenancing and aiding the defendant. It could not, therefore, comport with a decent regard either for the statute of the state, the general rule of law upon the subject, or for the judicial administration of the state, that we should allow the plaintiffs to maintain this action in the courts of the state.

Judgment affirmed.

Supreme Judicial Court of Maine, Penobscot County, June Term, 1849.

Rufus Dwinel v. Timothy Barnard et al.[1]

Should a person obstruct the flow of the waters of a river or stream over their accustomed bed, so that they could not be used as formerly for the purposes of boating or of floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to make use of them in the new channel as they had been accustomed to use them in their former channel.

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[1] We find in the *Bangor Whig and Courier* of July 17th, 1849, a report of the above named case. Below will be found a slightly corrected statement of the facts, which we are enabled to give, having before us a copy of the case, as made up by the justice presiding, to take the opinion of the full bench upon the points to be made.

It will be seen that it was opened at *nisi prius*, before Shepley, J., (now chief justice,) at the October term of the court in the same county, 1847.

"This case grew out of the celebrated 'Telos War,' which, it will be remembered,

But if a person, without right, should open a channel on his own land, and thereby divert the waters of a stream from their natural and accustomed course, without causing obstruction elsewhere, the public would not thereby become entitled to their use over his land.

The law does not require the lapse of any particular time to authorize the inference of dedication to public uses. But there must be evidence that the owner offered it, with design for public uses.

A proprietor of land may open a passage through his estate, for his own accommodation, and may permit others to pass it, under an an agreement for compensation, which agreement being founded on a valuable consideration, to wit, the injury done to the freehold, may be enforced at law. Those who may be injured by the opening of such a watercourse may abate it as a nuisance, or recover damages for that injury in an action at law. WELLS, J. dissenting.

THIS was an action of assumpsit, on a contract signed by the defendants, dated May 4th, 1846, which is to be copied — the writ and pleadings may be referred to. It appeared in proof, or was admitted, that before the year 1846 a dam had been built at the outlet of Chamberlain Lake, called by the parties Chamberlain Lake, but marked by a different name on the map hereafter named; that the waters which formerly flowed from the Allegash stream passed into that lake, and that the waters passed out of the lake at that outlet before the dam was built, and onward to the river St. John's, and that logs could be run from above the lake, through such waters, into the St. John's river; that a cut or channel had been made through a part of the township named in the contract, by which the waters, being obstructed by the dam before named, were turned from their natural channel, and caused to run through such cut or channel into the waters connected with

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was waged in the spring of 1846. It was supposed that the number of the men upon the 'drives' in the vicinity would attempt to force a passage through the cut or canal from the St. John's waters to those of the Penobscot, and Mr. Dwinel, to prevent such a result, sent thither a sufficient force to back the claims which he had put forth to an exclusive property in the cut.

"In the same summer, a war on the same subject, but on a different battle-ground and with different weapons, was commenced in the Maine legislature. David Pingree, Esq., of Salem, Mass., who was deeply interested in timber lands in the region of this cut, applied for a charter, authorizing him to establish a canal over the course of the then existing 'cut,' and to take toll for the passage of logs through the same. This application was resisted by Mr. Dwinel, who, as a part of the strategy of the day, made a counter application for a charter, at a lesser rate of toll. All the points, —whether to grant a charter to Mr. Pingree or to Mr. Dwinel, the sums to be fixed as toll, and the amount and kind of compensation to be allowed to either party by the other, for the works by each already constructed in the territory to which the dispute referred, — were vigorously disputed. Some thousands of dollars were spent by either party in this contest. It resulted in Mr. Dwinel's obtaining a charter, in which the toll for passage through the cut or canal was fixed at twenty cents per thousand feet. The rights under that charter Mr. Dwinel still enjoys."

the Penobscot river, so that logs could be run from above the lake into the Penobscot river, which formerly could be run only into the St. John's or its waters. The defendants, and several other persons, caused logs to be cut and hauled into the waters above the lake, during the winter of 1845–6, with the expectation and design of floating them through the waters before named into the Penobscot river. There being several millions of lumber prepared for such purpose, the plaintiff, apprehending that it was the design of the owners to float them through that cut or channel made on his land, without making any agreement with him to pay toll or compensation therefor, employed about fifty men, and sent them up to that cut or channel, with directions to obstruct the outlet thereof, and to prevent it, unless a contract was made to pay him therefor; and with directions, that if any attempt was made to run through by force, to prevent by force its accomplishment. The logs of the defendants, on the arrival of the men there, were found in the waters above and approaching the cut, and were the first (except those of the plaintiff) which were to pass it.

Notice was given that their logs could not be passed through it, unless they signed the contract above-named, and they thereupon signed it and their logs were passed through. The men sent up were detained some days after the defendants' logs were passed through, to prevent other persons' logs from being passed through, without coming to some agreement to make compensation therefor.

The grounds of defence will be perceived by the brief statement; and it was contended, that if the defendants were liable on the contract, they were not liable to pay any portion of the wages and support of the men after they signed the contract. These being matters which were considered proper for the decision of the court, the case was by consent taken from the jury, and is submitted to the court, to decide whether the defendants are liable on their contract to pay the plaintiff, and to what extent they are liable, and a default or nonsuit is to be entered, according as the rights of the parties may require. If a default be entered, the damages are to be assessed by a jury, if the parties do not agree upon any other mode of ascertaining them.

Rowe, for plaintiff.
Ingersoll, for defendant.

After recapitulating the facts in the case, as shown in the foregoing statement, Chief Justice SHEPLEY, delivering the opinion of the court, proceeded: —

If the defendants have acquired the right to float their logs in the channel made upon the plaintiff's land without his consent, the resistance and obstruction made by the plaintiff to such use of his land was unlawful, and the contract made with him to remove that unlawful obstruction must be considered as procured by duress and therefore invalid.

If on the contrary they have acquired no such right, they would become trespassers by such use of that channel without the consent of the plaintiff; and if they purchased of him a license to do such an act upon his land, a contract made to obtain that license would be a lawful contract. It would also be made for a valuable consideration, for it would impart to the defendants a right to which they were not before entitled, and it would deprive the plaintiff of a right, to which he was entitled.

To be relieved from the performance of their contract the defendants must show, that they have before acquired a legal right to the use of that channel to float their logs over the plaintiff's land. The acquisition of such a right is asserted upon three separate and distinct grounds.

1. That by the erection of the dam at the outlet of Chamberlain Lake and the obstruction of the flow of the waters to the river St. John's, and by the opening of a "cut," a channel to permit them to flow into the Penobscot river, all persons entitled to the use of the waters, as they formerly flowed, were equally entitled to the use of them, as they flowed on May 4th, 1846.

2. That the owners of the land, on which that "cut" or channel was made, by making it and causing the waters to flow through it, dedicated it to the use of the public.

3. That the "cut" or channel was offered to the public for use upon the payment of a toll, and that the owner having no right to establish a toll without a grant from the legislature, therefore any citizen might make use of it without the payment of toll.

1. In the consideration of the first position it will be assumed,

that the defendants had a right to use the waters of the Allegash stream and of the lakes to float their logs to a market. Should a person obstruct the flow of the waters of a river or stream over their accustomed bed, so that they could not be used as formerly for the purposes of boating or of floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to make use of them in the new channel, as they had been accustomed to use them in their former channel. If such were not the law, the public might be wholly deprived of their use by such wrongful act; for it might be possible to cause the waters to return and to flow again over their former bed. But if a person without right should open a "cut," sluice, or channel on his own land, and thereby divert the waters of a stream, river, or lake, from their natural and accustomed course without causing any obstruction elsewhere, the public would not thereby become entitled to their use over his land. They would not be entitled to enter upon his land and to use the waters in his canal, channel, or sluice, made perhaps for the purpose of operating valuable machinery, because some other person had obstructed the flow and egress of the waters from a distant point of such stream, river, or lake. If this were not the law, the person who had opened such channel or sluice on his own land would never be relieved of the burden and liability to pay all damages occasioned by it without repairing the wrong and removing the cause of injury occasioned by others as well as that occasioned by himself. This would make him suffer for injuries occasioned by others, for whose conduct he had never become responsible. He might with little expense be able to fill up or obstruct the channel made by himself and thus be relieved from all liability to the payment of damages for making it. But this he could never do, if the public immediately became entitled to its use. And he might never become lawfully entitled to enter upon the lands of others and remove obstruction occasioned by them at a distant point on such stream, river, or lake; for no person would lawfully enter upon the lands of others to remove such obstruction as a nuisance, who was not injured by its existence.

The person who diverts the waters of a stream, river, or lake, from their natural bed, is held responsible for all damages occasioned by his own acts. But the law does not make him

responsible for the acts of others performed at a distant point on the same river or lake. And he can no more be made responsible for them by being obliged to yield to the public the use of his private channel, than he can by an action at law. The injustice of it would be as great and glaring in the one case as in the other.

The application of these principles of law to the facts presented in this case, shows that the defendants had not acquired a legal right to float their logs over the plaintiff's land, without his consent, by reason of the dam and obstruction of the waters at the outlet of the lake, and of the opening of the channel across the land of the plaintiff.

The plaintiff did not erect that dam. He did not own the land upon which it stood. He did not obstruct the natural flow of the water at that outlet. He cannot be held responsible for acts which he did not perform or cause to be performed. He cannot be required to make compensation for such unlawful acts of others by allowing the defendants or others to use or enter upon his own lands any more than he can be required to do it by an action at law.

The defendants or others injured by the erection of the dam at the outlet of the lake, or by opening of the channel on the land of the plaintiff may obtain redress by an action at law to recover damages of those who have occasioned such injury. Or they may remove the dam and obstruct or fill up the channel as nuisances. The right to abate the channel as a nuisance does not authorize the use of it for the accomplishment of valuable purposes of a very different kind. If a person could in all cases use a channel made and used by another on his own land for the diversion of the waters of a stream or river from theirnatural bed in the same manner and for the same purposes, for which he might lawfully use them in the stream itself, the most valuable mills and manufactories might be thereby immediately destroyed.

2. The facts presented are entirely insufficient to prove that the channel made upon the plaintiff's land had been dedicated to the public use. It does not appear to have been used by any person for any purpose before the year 1846. The law does not require the lapse of any particular time to authorize the inference of a dedication. But there must be evidence that

the owner offered it and designed to do so for public or common use. There is no testimony tending to prove that the channel on the plaintiff's land was at any time offered for public or common use without compensation.

3. To establish a toll, the channel, way, passage, or other easement, must be expressed and offered to the use of all who may have occasion to use it, for a settled and established compensation. It must have become such a common channel, way, or passage, by the consent or acts of the owners, that he cannot maintain trespass against any person who may use it paying the established toll. Even such a use of property and exaction of compensation is not regarded as illegal by the owner of a wharf. But there is no proof of such an exposition of the channel for public use at an established price. No proof that the plaintiff or the former owners of the land ever offered the use of the channel to all persons disposed to use it, or to any persons, except those who had caused logs to be cut up on the presumption that they might in some way be enabled to float them through that channel. No toll, in the sense in which that word is used in the law, has been established, or exacted, or attempted to be; while compensation has been claimed, and that claim has been enforced for a license to float logs through the channel. In the case of *Wadsworth* v. *Smith*, (2 Fair. 278,) this court decided that "a proprietor may open a passage through his land for his own accommodation, and may permit others to pass it under an agreement for compensation, which agreement being founded on a valuable consideration, to wit, the injury done to the freehold, may be enforced at law. He may improve his watercourse by dams, locks, or otherwise, and withhold their use from all who will not make him a reasonable compensation." Upon the same principles he may make a new watercourse upon his land and withhold its use from all who will not make compensation, and authorize its use by those who will. And contracts for such use will be lawful and valid. Those who may be injured by the opening of such new watercourse, may abate it as a nuisance or recover damages for that injury in an action at law. But they cannot become legally entitled to use it, because the owner of the land had no legal right to open it.

It is only by misapprehension or by the confounding of prin-

ciples which distinguish one class of cases from another, in some respects similar, that the defendants can be relieved upon the facts presented from the performance of their contract. To relieve them from the performance the court should be able to state clearly the principle upon which their contract was held to be illegal, but no such principle has been presented.

The defendants by their contracts, among other stipulations, promised to pay Dwinel in bringing up to said cut from Bangor about fifty men to protect and guard said cut and all expenses connected therewith. The report states that the men were there detained some days after the defendant's logs were passed through to prevent others' logs from being passed through. And the court are by the agreement to determine to what extent the defendants are by their contract liable to pay those expenses.

It could not have been the intention of the parties to make the defendants liable for the payment of the time and expenses for the support of men for an indefinite and unlimited time after their own business had been fully completed.

It doubtless was the intention to make them pay one-half of all expenses so long as it became necessary to watch their operations. They will not, therefore, be responsible for any expenses incurred for the compensation or support of the men, or for their detention after their own logs had been floated through the channel.

The defendants are to be defaulted, and the action is to be continued for the assessment of damages.

TENNEY, J., concurred.

WELLS, J., dissented, delivering the following opinion: —

The facts of this case are very imperfectly presented. It does not appear by whom, nor when the dam obstructing the passage of the water into the river St. John's was erected, nor who was the owner of the land upon which it was erected. Nor does it appear who made the "cut" or channel on the plaintiff's land, nor when it was done. The case is so bald and barren of those facts which should be known, to lay the foundation for a decision, that it would be more satisfactory to have it presented to a jury to ascertain them.

But there are facts enough to show that the plaintiff is claiming to himself all the benefit of the dam and the channel. In the contract, upon which the action is based, the channel is called "his cut," and a person must be extremely incredulous, who does not believe that the plaintiff not only claimed the benefit of the "cut" but also of the dam. The "cut" and dam were made for each other, one being useless without the other, and while the plaintiff claims the benefit of the cut or channel, he does effectually claim that of the dam. He cannot shield himself upon the ground that he has nothing to do with the dam, while he is deriving toll for the flow of waters caused by the dam. But assuming that he did not make either, and only succeeds to those who did; how does his claim stand? He owned the channel when the contract was made, derived the right to take toll for its use, and was therefore availing himself of the use of the dam. He musters fifty men to maintain his claim, and compels the defendants either to fight their way through, to sacrifice their lumber, or to enter into a contract, the terms of which were dictated altogether by himself. Had he the right so to do? There was a vast body of water stopped by the dam, comprising Allegash and Chamberlain lakes and the Allegash river, the outlet of those lakes. The natural flow of these waters was into the St. John's, but they were turned by means of the dam and the channel into the Penobscot river.

1. The first question which arises is, are the waters thus turned from their natural course public or private? The public may acquire a right of servitude, in streams not considered navigable, at common law, by long user. *Berry* v. *Carle*, (3 Greenleaf, 269.) And fresh water rivers, though in point of property they are *primâ facie* private, yet they may be of public interest, and belong to the people, as public highways. *Spring* v. *Russell*, (7 Greenleaf, 290); *Palmer* v. *Mulligan*, (3 Caines, 307; 3 Kent Com. 27.) The magnitude and capacity for public use of our great rivers and lakes proclaim them as the highways, made by nature, to promote intercourse and commerce among mankind. *The People* v. *Platt*, (17 Johns. 195.) It is well settled that the public may acquire a servitude in waters, not navigable at common law. The Allegash is a fresh water river, not affected by tides. It appears by the case that it has been used for floating logs, without any

interference on the part of those claiming property in it. If the owners of its bed allow the public to use the waters which flow over it, the right to do so, is for the time being, equally as available to the defendant, as if it had been secure by a long user. No one questions the public right to use these waters, and it is unnecessary to inquire whether that right is gained by their extent and magnitude, and natural fitness for commerce, or by long use, or by dedication on the part of the owners of their bed to the public. The waters are unquestionably subject to public use. Both parties have treated them as such — have floated their lumber on them without claim or objection made by any one.

2. Has the plaintiff a right to appropriate these waters to his use, and claim compensation from those who pass through his channel? If the waters are public, he can only have a concurrent use with the citizens generally, he cannot be entitled to the exclusive use. The waters are not his and cannot be made so by a mere change in their course. It is quite immaterial whether he produced the change or it was done by another—so far the present action extends.

Here is not a case of the appropriation of water for mills or manufactories, which even in such cases cannot be done, to the detriment of public rights, without the sanction of the legislature, but an entire change of the outlet of a vast body of water, for the very purpose of turning it through a new channel, to float lumber into the Penobscot, instead of the St. John's. The question does not depend upon who has done this act, but upon the right in the *waters* themselves. The *land* in which the channel is cut is the property of the plaintiff, but the waters are not. They belong to any one who may desire to use them to float lumber. When flowing through the plaintiff's channel, they are still the waters of the Allegash, and the property of the public is not divested. If one should change an arm of the sea, so that it should pass through his land, or should succeed by purchase of the land to one who did, the common law right of navigation would not be taken away, nor would the right depend upon who made the change, but upon the public nature of the waters. A claim to toll in such a case would hardly be tolerated on the ground that the person claiming it was not the one who made the change. Such waters would still be

navigable, and it is that quality which gives the right to their use, notwithstanding the change of location, by whomsoever effected.

A person who might divert the Kennebec, Penobscot, or any other public river, turning it through his own land, could not by such usurpation acquire exclusive control over those waters, and preclude the public, who had a previous right, from following and using them in their new course. Nor could he, by a conveyance to another, assign a right which he did not possess. If the assignee could be permitted to say that he was not the wrong-doer, and therefore he had a just claim to prohibit any one from passing, the public would be entirely deprived of its property in those rivers.

Supposing the plaintiff had no agency in erecting the dam, he would not be responsible for its consequences, and if the flow of the water through his channel was any detriment to him, he might cause the dam to be abated as a nuisance. But he does not object to the present course of the water; his conduct indicates that he considers it a valuable right, and is solicitous to secure the profits of it. If it had been made against his wishes, it would have been very easy for him to have proved an invasion of his property.

How could the defendants be trespassing in passing their lumber through the channel? The water upon which that lumber floated was theirs in common with all others. The plaintiff had the power to stop its flow there, but did not do it. He must, therefore, be considered as assenting to it. One has a right to follow his property, of which he has been wrongfully deprived, into the care and possession of another, if he commit no breach of the peace. But here was a continuity of property, in the defendants, by means of the existing servitude, from the lakes and the river, through the channel. And it is not apparent, how one can be a trespasser in such a use of his own property.

The owner of land, through which a public river has broken, and forced a new bed, holds the same relation to the public as did the owner of the land over which it had previously flowed. He cannot claim the whole river as his property, because the waters are not his — nor are those who use it trespassers.

It is said in Angell on Watercourses, 221, "by what was

said as to those rivers which are public highways, it will appear, that a river of this kind, by constituting to itself a new channel, may convert a private field into public property; that is, the new channel becomes public for use and accommodation, and cannot be impeded or obstructed."

This principle is derived from the civil law: —

"If a river, entirely forsaking its natural channel, hath begun to flow elsewhere, the first channel appertains to those who possess the land close to the banks of it, in proportion to the extent of each man's estate next to such banks; and the new channel partakes of the nature of the river, and becomes public. And if, after some time, the river returns to its former channel, the new channel again becomes the property of those who possess the lands contiguous to its banks." (Just. Inst. Lib. 2, Title 1, § 23.) And this doctrine does not appear to be at variance with that of the common law, but it is believed that it can be clearly inferred from the principles of that law, applicable to public rivers.

If the river has been changed by artificial means which are still existing, and the owner of the new bed, though he did not cause the change, suffers it to continue, he cannot thereby acquire entire dominion over it. He might as well say in the one case, as in the other, that those who have a right to the use of it, should restore it to its ancient channel.

The beneficial use and right is in the *waters*, and the owner of the substratum, upon which they rest, cannot draw to himself an exclusive property in them. It is manifest that there was a concurrent action between those who built the dam and those who made the channel; and the plaintiff, if he was not one of those, is the owner of the land where the channel was made, and succeeds to the property in the position in which they placed it; their wrongful acts can confer no right upon him; as they could not acquire the control of the water, he cannot be in any better situation by their malfeasance. If they could not hold the defendants as trespassers, the sale of the land to the plaintiff would not render them such. He took the land, with the property of the public, and can acquire no rights superior to theirs.

In *Arundel* v. *McCulloch*, (10 Mass. R. 70,) it is said, that no individual can appropriate navigable waters to his own use,

or confine or obstruct, so as to impair the passage over them, without authority from the legislative power. The same principle must apply to those waters in which a public easement exists, for floating boats, rafts or logs.

The defendants having a right to follow the waters of the lakes and the Allegash, though the channel was made on the plaintiff's land, the contract which was entered into by them is void for want of consideration.

3. The power of taking toll is a part of the sovereignty, and the exercise of it must be derived from the government. A person cannot erect a bridge, or make a road, holding them out to public use, and taking toll, without authority from the state. But he may erect a bridge, or open a passage through his own land, for his own accommodation, and may permit others to pass there, under an agreement, for compensation; yet, he cannot take a settled or constant toll, even in his own private land. The distinction consists in the dedication, or holding out, of the franchise to public use, and in the reception of toll; and in a private use, in which others are allowed to participate, for compensation. *Olcott* v. *Bamfill*, (4 N. H. 537); *State* v. *Olcott*, (6 N. H. 74); *Wadsworth* v. *Smith*, (2 Fair., 278.)

The plaintiff, and those under whom he claims, must have contemplated, that the owners of lumber over a vast extent of territory would be under the necessity of running it through the "cut" or channel, to market — and that compensation would be obtained for the transit. The plaintiff claimed a toll of two shillings per thousand feet. Apprehending an attempt would be made to pass through without payment, he sent fifty men, with instructions to prevent, by force, the accomplishment of such purpose. The defendants entered into the contract declared on, agreeing to pay the toll demanded; and one half of the expenses incurred in the services of the men.

There were several millions of feet of lumber, cut by the defendants and others, lying in the waters, and intended to be passed through the channel, at the time when the contract was made. Indeed, there was no other way to run lumber from the Allegash and its tributary waters to the Penobscot river, but through it.

He manifestly held the channel out to public use, claiming

a toll for it. The defendants offered to pay what the legislature should establish or the law allow, but the plaintiff would not permit the logs to pass, without an agreement to pay the toll which he had fixed.

No doubt, any one may make a road over his own land, and erect a gate and refuse to let persons pass, unless compensation is made for the use of the road. And if the road is really made and intended for his own use, he would have a right to receive compensation for the license. But if the road is made for the use of the public, or one already existing so appropriated, with the intention to derive toll from a public use, such a franchise cannot be established without authority from the government. A partial and limited use by the owner himself, in concurrence with the public, could not alter the real nature of the franchise. So also a person may make a canal and locks, to improve the navigation of a private river for his own use, and receive compensation for the use of them by others; but if the great and paramount object is public and not private use, to obtain tolls or profit from the public, such a course cannot be pursued without a charter from the legislature. Unless so plain a distinction is observed, it would be easy for any one to establish a lucrative franchise, without application to the proper authorities; and numerous evils and impositions would flow from such assumptions, on the part of individuals claiming such powers, which would be restrained only by their own interest or will. The present case is a fit illustration of the wisdom of the law, in establishing the principle under consideration. The plaintiff caused a band of fifty men to march many miles, for the purpose of preventing, by force of arms, the use of the channel without the payment of a toll, which he has established, thus endangering the public peace, and the lives of those who might enter into the conflict. And the defendants, to save their property, which would have been worthless unless it could have been got to market, were under the necessity of entering into the contract prescribed by the plaintiff, not only to pay the toll, but one half of the expenses incurred by the plaintiff in the alleged employment of his men to protect and guard the channel, thus swelling his claim to an enormous amount; while there is no evidence of any preparation, on the parts of the defendants, to obtain by force the use of the channel.

The case is submitted to the court, for its decision upon the fact, whether the plaintiff held his channel out for public use, or whether he kept it for private use, and the public use was but incidental. But the whole bearing of the facts most clearly shows, that the channel was kept for public use. It was evidently intended for the passage of lumber, to be cut on an immense extent of territory, and there is no evidence the plaintiff owned any more than the township through which it was made. His own lumber must have been of small amount, in comparison with that of all other owners. At the time when the defendants entered into the contract, there were several other persons' logs passed through the channel, and of whom compensation was claimed, and the men were detained to prevent their passage without some agreement to make compensation.

No length of time is necessary for the continuance of such claim, to render it illegal. The first act of claiming toll, under a franchise set up without authority, is as objectionable as a subsequent one. How long prior to 1846 such claims had been made, is not exhibited; but there is sufficient evidence in that year of those made, to show the extent and purpose of them, and to prove the paramount object to have been, to keep the channel for public use.

The plaintiff being prohibited by law from taking toll under such circumstances, the contract was in violation of law, and cannot lay the foundation of an action. But there is another ground of defence to this action, even if the claim were not in direct violation of the law, and prohibited by it. It is true a contract, obtained by menace of a trespass to land or goods, by the common law, is binding, because redress may be obtained if such injuries be inflicted, (Chitt. Contr. 45.) But in *Chase* v. *Dwinel*, (7 Greenl. 134,) the plaintiff recovered back the money he had paid for damage of logs, which were not subject to it. As the loss of property would have been very great to him, if he had resorted to an action for damages, or to recover his logs detained under a claim illegally made, he was allowed to recover the money paid, on the ground of extortion, and that the payment was not voluntary.

The contract which the defendants made is inoperative for a like reason, the logs not being subject to the demand of the plaintiff. No threat of injury to their property was made; but,

to save themselves from an impending loss, they signed the contract. The same principle, which would have enabled the defendants to recover back the money if it had been paid, furnishes a defence to the action. In my opinion, there are no legal grounds upon which this action can be sustained.

United States Circuit Court, Southern District of New York, Oct. Term, 1849. — Before Judges NELSON and BETTS.

THIRION MAILLARD ET AL. *v.* CORNELIUS W. LAWRENCE.

"Worsted" and "silk and worsted" shawls are liable to a duty of 30 per cent. *ad valorem*, under the act of 1846.

THIS was an action brought by the plaintiffs to recover a large amount of duties, paid under protest, on various importations of silk and worsted and worsted shawls, under the tariff act of 1846, now in force. The articles in question were charged with the duty of 30 per cent. *ad valorem*, as "wearing apparel, made up or manufactured, wholly or in part, by the tailor, sempstress, or manufacturer." The plaintiffs claimed to enter them at a duty of 25 per cent., as "manufactures of silk and worsted." At the trial a nominal verdict was given for the plaintiff, and a motion for a new trial, on a bill of exceptions, was argued at the April term.

BY THE COURT, — NELSON, J. — The shawls in question were properly charged with the duty of 30 per cent. *ad valorem*, as "wearing apparel." These words were introduced for the first time in the tariff act of 1846, and are intended to refer not to the commercial designation of any class of articles, but to the use for which they are intended. These shawls, as appears by the evidence in this case, were manufactured on the loom, separated from each other by threads which form the fringes of the shawls when cut apart. In these fringes knots and twists were made by the manufacturer before leaving his hands, and the shawls, when thus completed, are in a perfect state, and ready to be worn on the person.

The evidence also showed that such shawls were imported into the United States for the purpose of being worn without farther additions or alterations, and were thus, in the common

acceptation of the term, "wearing apparel." The phraseology of the tariff act of 1846, in enumerating articles liable to the rate of 30 per cent. duty, is intended to include such shawls as articles of *wearing apparel*, without reference to the fabric of which they may be composed. The duty was, therefore, properly charged and collected, and a new trial must be granted.

United States District Court, Southern District of New York.
Before JUDGE BETTS.

THOMAS LYNCH ET AL. *v.* WILLIAM CROWDER.

Jurisdiction of the admiralty in suits by foreign seamen examined and explained. Rule as to costs.

THIS was a British ship, with a British crew, shipped in England, and bound to Staten Island, and thence to a port of discharge in the United Kingdom. She brought out a cargo for Quebec, and passengers to Staten Island, where, on her arrival, the men requested to be discharged. The weight of the evidence is, that the master assented to their leaving the vessel, and to go to the British consul's office for their tickets of nationality and service. The master subsequently refused to consent to the discharge of the crew, or to pay them their wages, and the written dissent of the British consul to the crew's being permitted to sue in the United States Courts for their wages, is filed.

BETTS, J. The principle, which the Court has repeatedly announced, and to which it is always disposed to adhere, is to decline taking cognizance of suits by foreign seamen, when the voyage is not completely broken up or terminated, or the seamen have been wrongfully separated from the ship, or placed in a state of destitution here. The rule is founded upon the common interest all commercial nations have in preserving the services of their seamen to the vessel during the whole period of their engagement, and especially to secure their return home with the ship to the place of their allegiance. It would be pernicious to the interests of trade and commerce to encourage seamen in suits for wages in foreign ports, as the master or vessel, and frequently both,

must in that way be interrupted in the business of the voyage, and the general adventure be subjected to embarrassing delays and losses. The occasional hardship which seamen must be subjected to by the enforcement of the rule, will be more than compensated in the advance of the commercial benefits of trade and navigation, and in giving greater confidence to owners and masters in the fidelity of crews, and to the crews a stronger motive to fulfil punctually the terms of their engagements.

I do not perceive that the principle is varied at all by the consent of the master that the crew may leave his vessel. They may acquire by that a right in their home judicatories, to wages for the full voyages, the same as if it had been entirely performed; but no act of wrong is done them, and others are placed in no condition of necessity to appeal to a foreign tribunal for means of subsistence. It will probably be found in general that they ask and obtain their discharge with a view to more profitable employment.

But what to my judgment is still more conclusive against the maintenance of this suit by them is, that the official representative of their own country disapproves of their acts, and solicits that the court will not entertain the action, connected, moreover, with the consideration that the court would be compelled to look into all the circumstances leading to, and accompanying the alleged discharge, to determine whether it was really voluntary on the part of the master, or whether it was coerced from him, or even perhaps whether there is not a guilty connivance between him and his men in granting it. Every thing touching the validity of the supposed discharge belongs most properly to the courts where the litigants and this ship belong, and the law common to them all is the rightful criterion by which their rights and remedies should be adjusted.

I shall accordingly decline taking cognizance of the action, and order the libel dismissed. But as, on the proof before me, it is made to appear that the master gave his unreserved consent to the libellants, allowing them to leave the ship, and as he has furnished no proof that he recalled that consent before they had incurred costs, in endeavoring to secure them, and as such breach and violation of his original consent has imposed on them the loss of such suits it is no more than reasonable, that, in being acquitted of the men's demand, he should be

compelled to make good in part this particular injury, sustained by means of his own acts. I shall, therefore, order farther, that the respondent pay the libellants summary costs in this suit.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Maine, Penobscot County, June Term, 1849.

[Present, TURNEY, WELLS, and HOWARD, Justices.]

Hiram Corliss v. *John McLagin et al.* A mortgagor who has put into a mill mortgaged by him a shingle machine and gearing, cannot maintain trover for the same against the mortgagee or those claiming under them, they being in possession, and the redemption of the mortgage foreclosed.

Knowles and *Dinsmore*, for plaintiff; *Kelley* and *McCrillis*, for defendants.

Joseph C. Stevens et al. v. *Thomas A. Hill.* By the common law, upon the civil death of a corporation its real estate reverts to its grantors, and the debts due and from the corporation are extinguished; but by our statute, (Rev. St. ch. 79, § 28,) the property belonging to a corporation at its final dissolution vests in the stockholders, or members, as tenants in common. And where, by a vote of the stockholders of a bank, all the property of the corporation is assigned to trustees, for the use and benefit of the stockholders, such trustees may maintain a suit brought by them, after the expiration of the charter of the bank, upon a note indorsed to them by the president of the bank, before the expiration of the charter, it appearing that the indorsement was authorized by the directors at a meeting previously held.

Prentiss and *Rawson*, for plaintiffs; *Appletons*, for defendants.

Edward R. Southard v. *Nathaniel Wilson.* It is competent for the defendant, in a suit upon notes secured by a mortgage, the redemption whereof has been foreclosed, to show the value of the mortgaged premises in payment *pro tanto* of the notes; but where a mortgagor (on May 5th, 1840,) gave the mortgagee possession, acknowledging in writing the breach of the condition of the mortgage, but such acknowledgment was not recorded, according to St. ch. 372, February 20, 1839, the proceeding did not operate as a foreclosure of a mortgage, although the mortgagee retained the possession, and the value of the premises is immaterial in an action upon the mortgage notes. Judgment upon the default.

Washburn, for plaintiff; *Wilson*, *pro se*.

Martha Pierce, Administratrix v. *David Pierce.* The words written upon the writ "From A B's office," in the handwriting of A B, who afterwards entered the action, and appeared as the plaintiff's attorney, are not an indorsement of the writ by the attorney, within the meaning of Rev. St. ch. 133, sect. 7, respecting depositions.

Moody, for plaintiff; *Kent* and *Cutting*, for defendant.

Ruel Williams v. *Stephen Spaulding.* Where a plan is made, intending to delineate a previous survey, and there proves to be a variance between the survey and plan, and a conveyance is made referring to the plan, the grantee will hold according to the survey.

The survey, (indicated in the case of wild lands by marked trees in the forest,) is the original, to which the plan, as its copy, must yield.

Where the demandant and tenant claimed under deeds from a common grantor — the deed to the tenant being of Lot No. 8 in the second range, "according to Samuel Weston's survey," and that to the demandant being Lot No. 10 in the first range, described as "being numbered on *said plan* of said township, taken by Samuel Weston, surveyor," — and a plan in the handwriting of said Weston was produced, following which, the demanded premises would fall within Lot No. 10, whereas, following the lines of the survey on the face of the earth, the premises were within Lot No. 8; *held*, that the demandant could not recover.

W. L. Walker, for demandant; *I. & A. Waterhouse*, for tenants.

Jonathan R. Holt v. *Ebenezer H. Barrett.* The thirteenth section of the ninety-seventh chapter of the Revised Statutes, providing for appeals from the district court to this court, does not apply to actions originally commenced before a justice of the peace. The remedy for the party, in such case, aggrieved by the judgment of the district court, is by exceptions. And the same point is settled in the case of *Putnam* v. *Oliver*, (27 Maine,) decided at the last term in Franklin County.

The question raised by the parties, however, has been decided at the same term, in the case of *Corliss* v. *Shepherd*, *post*.

A. Waterhouse, for plaintiff; *S. W. Robinson*, for defendant.

Hiram Corliss v. *Samuel Shepherd.* If a debtor, after he is decreed a bankrupt, (under the Act of Congress August 19, 1841,) and *before his discharge*, promises to pay a debt provable under the bankruptcy, an action will lie upon such new promise, notwithstanding the discharge.

Dinsmore, for plaintiff; *Poors*, for defendant.

Frederick Spofford, petitioner, v. *George M. Weston.* The words in the statute, (Rev. St. ch. 91, § 26,) "persons having actual notice thereof," render nugatory many decisions heretofore made upon the subject of constructive notice of deeds not recorded.

A party relying upon an unregistered deed against a subsequent purchaser, must prove that the latter had actual notice or knowledge of such deed. It is not enough to prove that such party came to the knowledge of facts that would reasonably put him upon inquiry. He is not bound to inquire. And so is the case of *Pomroy* v. *Stevens*, (11 Metc. 244.)

Kent and *Cutting*, for petitioner; *Appletons*, and *George M. Weston*, for respondent.

James Phillips v. *Oliver Frost.* The acceptance of a bill, draft, or or-

der may be verbal. The acceptance of a bill is a contract, and the acceptor is holden according to its interpretation.

Where a bill for $100 was drawn upon A B, and, on being presented to him for acceptance, he wrote upon it, "Received of A B $75 towards this order, being all said A B agrees to pay, unless the drawer intends this order to be exclusive of $25, paid by A B without order," such indorsement constitutes a qualified acceptance of the bill by A B, and, it appearing that afterwards a written request of the drawer was presented to him, directing him to pay the whole amount of the $100, without deduction of the $25; *held*, an action would lie in favor of the holder of the bill against such acceptor for the balance.

It seems that it is not competent for the acceptor in such case to set up that, at the time of the presentation of the order, or at the time of delivery of the subsequent written request, the drawer of the bill was indebted to him, and that he in fact owed him nothing.

Hathaway & Peters, for plaintiff; *Appletons*, for defendant.

Supreme Judicial Court of Massachusetts, October Term, 1849, *at Worcester.*

Sigourney, Adm'r, v. *Seabury.* Assumpsit upon a promissory note, witnessed — made payable to plaintiff's intestate, and brought for the benefit of one Libby, who purchased the note of intestate in 1832. Intestate died in 1838, and plaintiff, as administrator, has settled his final account in the probate office, never having inventoried this note as a part of the assets in his hands. The note was payable to order, and endorsed by intestate in blank.

The court (Metcalf J.) held, that the note being payable to order and endorsed in blank, became transferable, by delivery, like a note payable to bearer; and if no fraud is suggested, it becomes wholly unimportant in whose name the action upon it is brought. The presumption of ownership, resulting from possession, is in such case all the evidence the law requires. *Little* v. *O'Brien*, (9 Mass. R. 423); *Beekman* v. *Wilson*, (9 Met. 434); *Gage* v. *Kendall*, (15 Wendell R. 640); *Guernsey* v. *Burns et al.* (25 Wend. R. 411.)

The provision in the statute of limitation, excepting witnessed notes from its effect, is peculiar to Massachusetts. The effect of such attestation was fully discussed and settled in the case of *Hodges* v. *Holland* (19 Pick. 43,) which fully sustains the right to maintain the present action by the endorser, in the name of the representative of the original payee.

It is no objection to plaintiff's recovery, that the estate of his intestate has been settled in the probate office. His authority to sue does not terminate with such settlement. It is said, if permitted to bring actions after closing the settlement of an estate, administrators would have it in their power to charge the estate with costs. But administrators are in all cases personally liable for costs in suits commenced by themselves, if they fail to maintain them; and whether they shall be charged to the estate or not

is a question which is to be settled upon the merits of each particular case in the probate court.

Bowman, for plaintiff; *Fuller*, for defendant.

Pratt v. *Felton*. This was an action to recover dower in certain real estate conveyed by demandant's husband, in his lifetime. At her husband's decease, he left a will, by which he devised real and personal estate to his wife, which she entered upon and occupied after his death. Nothing in the will intimated an intention that she should receive any thing besides the provisions therein made. The question was, whether she had made such an election as entitled her to maintain this action under ch. 60 § 11 of the revised statutes? The evidence of the election on her part consisted in a demand of dower made upon the tenant, followed by the commencement of the present action. But it also appeared that she continued to occupy the estate devised to her, until after the present action was commenced, and the facts in this case had been argued by the parties.

The court (Wilde, J.) intimated that the regular mode of making an election by a widow, where she claimed dower, instead of the provisions made for her in a will, is by notice at the probate office, although a notice there is not regarded as an essential prerequisite to her recovery of dower.

In this case, the facts do not show an election on her part. If she claimed her dower, she continued still to hold the devised estate, and if it proved any thing it was that she claimed both estates rather than electing one in preference to the other. And as she could not lawfully recover both, although the tenant held by virtue of a conveyance made by the husband prior to the execution of his will, she must be content with provision thereby made for her. Demandant nonsuit.

W. A. Bryant, for demandant; *Barton & Bacon*, for tenant.

Rice v. *Burt*. This was assumpsit to recover sundry items of account. The defence relied on was, 1st. statute of limitations; 2d. discharge in insolvency. Under the proceedings in insolvency, plaintiff had proved his claim and received a dividend within six years. Defendant had been regularly discharged as an insolvent. Plaintiff sought to avoid the discharge upon the ground of fraud in obtaining it; and also the statute of limitations, by showing that these facts had been fraudulently concealed by defendant till within six years.

The court (Metcalf, J.) held, that the payment of a dividend by the assignee of the defendant, did not take the case out of the statute, on the ground that it was a payment of a part of the debt made by the debtor. Nor would a fraudulent concealment of the facts, upon which plaintiff might have avoided defendant's discharge, bring the case within the provisions of § 12, ch. 120 R. S., as to a concealment of the cause of action. The plaintiff's cause of action is the debt declared on, and this has never been concealed from the plaintiff. Nor would the proof that defendant fraudulently concealed his effects from his creditors, tend to show that he had concealed the cause of action upon which plaintiff seeks to recover. The case cited from 3 Mass. Rep. 201, *First Massachusetts Turnpike Co.* v. *Field*, is an illustration of the concealment of a cause of action which prevents the operation of the statute of limitations. Plaintiff nonsuit.

Thomas, for plaintiff; *Dewey*, for defendant.

Walker v. *Southbridge*. *Assumpsit*, for support of a pauper. It appeared that plaintiff was one of the overseers of the poor of defendant town, and had kept the pauper for one year under a contract with the town, which terminated on the —— of April, 1846. At that time, the support of all the paupers in the town, for the current year, was let by auction to one J——. The plaintiff was a party to such letting. The overseers accordingly went to plaintiff's house, to deliver the pauper to J——; but before his actual removal, they left the house, and he was in fact left in plaintiff's family, and remained there during the whole year. The other overseers, supposing he remained by some arrangement with J——, had no notice of any intention on the part of plaintiff to look to the town for his support, till he demanded payment at the end of six months, and for this the present action is brought. The presiding judge, at the trial, ruled that, inasmuch as the overseers knew the pauper was at plaintiff's house, it was incumbent upon them to inquire into the circumstances under which he was there, and that no formal notice to the overseers by plaintiff was necessary in order to entitle him to recover.

The court (*Fletcher, J.*) held, that in order to plaintiff's recovering, he must show a strict compliance with the provisions of the statute, (Rev. Stat. c. 46, § 18.) It is only after "notice and request," that he can hold the town responsible for the pauper's support. Not only, therefore, must he prove an actual notice, but request — there must be an intelligible call upon the town for such support, before they can be made chargeable therefor. And a strict compliance with the statute ought to be insisted upon for the protection of towns. Their officers are not required to go in pursuit of paupers in consequence of a rumor or report that there are such in town. It is enough for them to act when they have been requested to take care of such pauper by the one who seeks to charge the town for furnishing his support.

Wood & Hyde, for plaintiff; *W. A. Bryant*, for defendant.

Felton v. *Brookes, Executor*. *Money had and received*, upon the following facts. Plaintiff mortgaged a certain house to Bacon, to secure the payment of a sum of money, and assigned to him, as collateral, a policy of insurance thereon, which he had effected at the Worcester Mutual Office. This assignment was with assent of the office.

Subsequently, plaintiff conveyed the estate to one Rice, who, by the terms of the deed, was to pay the mortgage debt. Bacon assigned the mortgage and policy of insurance to defendant's testator, to whom Rice paid the mortgage debt in full. At the expiration of the policy, a return premium was paid by the office to defendant's testator, as holder of the policy, and this is the money sought to be recovered in this suit. It was objected, that when the testator received the money he was under no contract or legal obligation to repay it, as no agreement was made to that effect when he received an assignment of the policy; and, furthermore, that there was no privity between him and plaintiff, whereby the present action could be maintained.

The court (*Shaw, C. J.,*) *held*, that as the policy was assigned to Bacon as collateral security, when it passed to the testator he held it subject to the same equities. The principle is an universal one, that where a

person holding collateral security for a debt, whether real or personal, receives money upon it, he holds it in trust for the pledgor, if the principal debt is paid. When, therefore, the testator received payment of the mortgage debt, he had no right to hold the results of the collateral against the mortgagor, and consequently he held it to the mortgagor's use. The holding of money, to which *ex æquo et bono* the plaintiff is entitled, creates such a privity between the parties, that no objection can be made on that ground to the maintenance of the present action.

W. A. Bryant, for plaintiff; *F. A. Brooks*, for defendant.

Parke v. *Darling*. *Trover*, for a horse taken upon a writ and execution, in favor of defendant against plaintiff, and sold by an officer by defendant's directions.

To justify such sale, defendant produced an execution issued by a justice, with the officer's return thereon. Plaintiff, in order to show that no such judgment as recited in the writ of execution was ever rendered, called the justice, who produced a book containing minutes of the amount of the judgment and date of execution, but no other papers; neither the original writ, nor the note declared on in the original action.

The defendant then offered, and was allowed to put in evidence, the execution objected to, a writ, note, and bill of costs which came from a third person's hands, corresponding, in all respects, with the justice's minutes, to show that the judgment was properly rendered, and these papers were submitted to the jury.

As the plaintiff proposed to rely upon the taking of the property upon the original writ, as well as the sale upon the execution, as evidence of its conversion by defendant, the presiding judge, upon defendant's motion, required him to elect upon which of these acts he relied to sustain the action. To this plaintiff excepted. The jury found for defendant.

The court (*Wilde, J.*,) *held*, that if the action had been against the officer, there would have been no occasion to have gone farther than to produce the writ of execution, properly executed. Whether the judgment was erroneous, would not have been for him to inquire. But against the creditor the proof in defence must go further, and establish a judgment in order to justify the taking.

Two objections are made to the evidence offered: 1st, That it was not competent for a justice to make up a record, after issuing an execution from papers collected like these, from various sources, and not in his own custody at the time; and, 2d, If it was, it was not a question for the jury but for the court, to determine by inspection whether they form the proper basis of a judgment and execution.

If there were any question whether any of the papers produced were the identical ones used at the original trial, it might be proper and necessary to submit the inquiry to the jury. In the present case, the submission of the matter to the jury was immaterial, since an inspection of the papers themselves satisfies the court that the finding of the jury is according to the evidence derived from this inspection. The justice would be justified in making up a complete record from these papers; and his not having actually written it out was properly waived by plaintiff, as an objection to the competency of the evidence.

The judgment being established, the sale upon the execution becomes valid; and consequently the question made, in regard to the order of the court requiring plaintiff to elect upon which ground he sought to maintain his action, becomes unimportant. The court, however, expressed a doubt of the propriety of such an order. It is not like the case of several distinct trespasses, where plaintiff has declared upon one only. In such case, the court may require the plaintiff to elect for which he will go, and restrain him to the proof of that alone as the ground of his action. This point, however, was not determined, and the exceptions were overruled.

W. A. Bryant, for plaintiff; *Thomas*, for defendant.

Fitchburg v. *Winchendon*. *Assumpsit*, for support of a pauper, whose settlement was alleged to have been gained in the defendant town, by a residence of ten years and the payment of taxes during five of them. After the evidence of plaintiff was in, the presiding judge ruled that it was not sufficient to go to the jury, and ordered a nonsuit; to this plaintiff excepted. The evidence tended to show that the pauper was in Winchendon the requisite term of time, and paid taxes there; that, when he went there it was with an intention to make it his domicile, and to remove his family there as soon as he could, but did not remove his family till within the ten years.

The court (*Fletcher, J.*) *held*, that whether the pauper was a resident within the town of Winchendon so as to gain a settlement, was peculiarly a question of fact for the jury. It depended upon intention, and how far that intention was carried into effect. And this might depend upon the situation of his family, and other circumstances bearing upon the great question in the case, — that of intention. When, therefore, the judge, relying upon the fact, that his family had not actually been removed to Winchendon, undertook to settle the question as a matter of law, his ruling was incorrect, and the plaintiff's exceptions were sustained.

Wood, for plaintiff; *Thomas*, for defendant.

Heath v. *Randall*. *Trespass*, *qu. cl.*, and for taking a pair of oxen alleged to be plaintiff's. Plaintiff proved the entry upon his close by defendant, and the taking of the oxen. Defendant relied, in defence, upon title to the oxen, and license to enter upon plaintiff's close. It appeared in evidence that the oxen originally belonged to defendant, who bargained them to plaintiff for a certain sum, the oxen to remain defendant's till paid for, and he to have a right to take them at any time until such payment. The oxen were delivered to plaintiff. A part only of the purchase-money having been paid, defendant entered plaintiff's close and drove them away. The presiding judge ruled, that under this state of facts the defendant had a right to go upon plaintiff's close, for the purpose of regaining possession of the oxen, and to this plaintiff excepted.

The court (*Shaw, C. J.*,) *held*, that such conditional sale did not, as between the parties, vest the property in the vendee, although accompanied by a delivery of the property. Vendor retained a lien for the price, until that was paid, and might take possession under such lien at any time as against the vendee.

The right to take away the cattle from plaintiff implied a right to enter

upon his close, in a proper and reasonable manner, and drive them away; because when the plaintiff agreed that he might retake them, he thereby gave a license to do whatever was reasonably necessary to enforce such a right. In other words, it was a license to enter his close for the purpose, if necessary. The court suggested, that the ruling of the court in Shylock's case, that though he might take a pound of flesh he had no right to take a drop of blood, would not be regarded as good at common law, whatever it might have been in Venice. Plaintiff nonsuit.

W. A. Bryant, for plaintiff; *Wood*, for defendant.

Bacon v. *Lincoln*. *Covenant Broken*. Plaintiff declared upon the covenant of seisin, contained in a deed of land lying in the state of New York. The covenant was in the usual form contained in deeds in use in this commonwealth; and the breach alleged in plaintiff's declaration was, that defendant was not seised in fee of the premises described in said deed, nor had he any seisin whatever thereof, nor any right to sell the same.

It appeared in evidence that the defendant, when he made the deed, had no land which answered the description of that supposed to be conveyed thereby; and the defendant contended, that if no such land existed no action could be maintained upon the covenants in the deed; plaintiff's remedy must be to recover back the consideration paid.

The court (*Wilde, J.*) were of opinion that the objection could not prevail. Had the action been upon the covenant of warranty, plaintiff must have failed; because the ground of recovery in such action is an eviction, which could not have been alleged where there was no estate *in esse* to be operated upon by the deed. But this is a personal covenant, not running with the land; and if, in fact, defendant was not seised of such an estate as he proposed to convey, it was immaterial, in the maintenance of this action, whether it had any existence or not. Nor was it necessary, in declaring for the breach, to aver that there was no such land as defendant described in his deed. The averment, that he was not seised of the described land, was sufficient. The proof offered sustained that averment.

W. A. Bryant and *Williams*, for plaintiff; *Barton* and *Bacon*, for defendant.

Brown v. *Foster and Trustee*. *Question upon trustee's answer*, which disclosed an indebtedness to principal defendant, for services of his minor son. One Haywood claimed the amount of the same services, as assignee, and was made a party to the suit. It appeared that the principal debtor, without consideration, drew an order on the trustees for the services of said son, in favor of a minor daughter; and, being indebted to Haywood, agreed with him that he should have the benefit of his son's services, and placed in his hand the aforesaid order, which was not in a negotiable form: but no notice of such intended transfer was given to the trustees, until after the commencement of this suit. The question was, if this amounted to an assignment?

The court (*Fletcher, J.*) *held*, that a mere intention to transfer such a credit was not sufficient. It was a question which of two creditors should have a preference? A mere agreement by the debtor, that Haywood

should have the proceeds of his son's services, without any notice to that effect to the person in whose employment he was, could not amount to an assignment of such services or indebtedness, although accompanied by the delivery of such an order as was disclosed in this case, which was neither negotiable in form nor originally drawn for a good consideration.

W. A. Bryant, for plaintiff; *Stevens*, for assignee.

Flagg v. *Milbury*. In applying the provision of the statute, rendering towns liable where defects have existed in a highway for twenty-four hours, Sunday is not excluded from the computation of the time.

Supreme Court of New York, First Judicial District, General Term, September, 1849, *at New York.*

[Present, JONES, Pres. Just., HURLBUT, and EDMONDS, Justices.]

De Peyster & Whitmarsh v. *The Sun Mutual Insurance Company*. An insurance on cargo at and from Santa Martha on the Main to New York, with liberty of touching at two other ports, with the privilege for an additional premium, of performing a voyage from Santa Martha to Chagres, and back to Carthagena, and of using three additional ports on the voyage from the main to New York, means ports on the Spanish main, before the final departure therefrom for New York, and the use of five ports on the main, before the return voyage, was no deviation.

Thomas Phenix v. *James Romer*. The taxable costs awarded against the defendant belong to the plaintiff, and not to his attorney, and where the attorney has agreed to conduct the suit for a specified sum, which is paid him, he has not a right to the taxable costs also, and his client may release those costs without subjecting himself to any liability to the attorney therefor.

Peter A. Hargous v. *Joel Stone's adm'r*. A party ordered cotton goods of a particular quality, which he selected from several samples shown him. Held that this was not a sale by sample, but though the goods were delivered to him in bales, if he had an opportunity of examining them before accepting them, the rule of caveat emptor applies, and he cannot recover for any damage which he may have sustained by reason of their falling short of the required fineness.

John S. Giles, receiver, v. *Andrew Comstock*. Same v. *George Watson*. Where rent payable in advance was suffered to be in arrear until the end of the term, and before the end of the term the lessor's interest in the premises was sold on a foreclosure of mortgage prior in lien to the lease, and the purchaser's title became complete, whereupon the tenants attorned to such purchaser, held that this was a lawful eviction, and barred the lessor's right to recover the rent.

Davis & Brooks v. *Foster Reynolds and others*. Where in a tripartite contract it is agreed that one of the parties shall make the purchases,

another party shall make all the advances necessary therefor, as well for the share of his co-adventurers as his own, and the goods shall be consigned to the third party, who shall immediately on the goods coming to hand, make good to the party advancing the sums he has advanced; the party thus advancing has a lien on all the proceeds for his payments, and the consignee cannot retain a sum due to him from the party making the purchases, on account of another adventure.

And where a dual contract is made between two of those parties on the same terms, except that the party making the advances withdraws from having any interest in the adventure, he becomes the mere broker of the parties, and has a similar lien on the proceeds for his advances.

Powell and others, v. *Striker*, late Sheriff of Kings county. The steam engine, worms, tubs, and apparatus erected for the purpose of a distillery, and used therewith, but which may be removed without damaging the building, although not fixtures as between landlord and tenant, may be so as between the owner of the fee and a mortgagee.

In the latter case, articles purely personal in their character, and not indispensable to the distillery, are not fixtures.

John J. Palmer, receiver, v. *Groesbeck* and *Judson*, trustees, *and others*. On an application for a loan of money, the lender loaned stock which it was proved was at the time quoted at the Board of Brokers at 95 per ct., but as there was no evidence that the stock had cost the lender less than par, or was worth less than par, to the borrower, or that he had not realized par for it, the loan was not usurious.

Henry J. Seaman, v. *Daniel Low*. Where there was a mistake of fact on the purchase of stock, the contract may be rescinded.

George P. Bradford, v. *Charles G. Hart and others*. *Charles G. Hart*, v. *Riley Reid and others*. — The contract of sale from Reid to Hart, was fraudulent by reason of the false representation and fraudulent concealment of material facts by Reid, and it ought to be rescinded, but inasmuch as Hart cannot by reason of his mortgage on the premises to Suydam, Reid & Co., restore the property in the same situation as when he received it, the deed from Reid to him must be affirmed for Riley Reid's one half the premises, and he be declared responsible for one half the consideration money agreed to be paid, and the mortgage from Hart to R. Reid, declared to be good in the hands of Bradford, for so much of said half the consideration money, as on proper accounting may be found to be due, and in order to ascertain that sum, there must be a reference, on which Hart is to be debited one half the consideration, and the whole of the rents and profits of the premises since he went into possession, and to be credited the sum at which the lot in Binghampton was agreed to be taken, and such sum as Hart has actually paid in money or goods towards such consideration, excluding therefrom his previous account against R. Reid, and for the sum which shall be found to be due on such accounting. Bradford to have a decree of foreclosure of the mortgage as for the consideration money, and Suydam, Reid & Co., to be declared subsequent incumbrances on R. Reid's moiety for the amount of their mortgage. Hart's cost of the cross suit to be paid by R. Reid. The costs of Bradford and of Suydam, Reid & Co. in that suit to be paid by Hart.

Horatio N. Carr v. *Lester D. Moore.* On a contract for a sale of the good-will and furniture of a hotel, in which the several parties bind themselves to the performance, under pain of $500; such sum is a penalty, and not a measure of damages; and the vendor, never having surrendered or been disturbed in his possession, but retaining both hotel and furniture without change, his damages for the refusal by the vendee to perform are merely nominal.

Cyrus W. Field v. *City of New York.* An assignment by the corporation printer of such compensation as he may be entitled to, for work to be done and materials to be furnished, though not enforceable at law, as a conveyance *in presenti*, may be enforced in equity as a contract to convey such earnings. Notices to a corporation are valid, when given to that officer of the corporation whose particular department embraces the subject matter of the notice. Hence, a notice to the comptroller of the city of New York of the assignment of a claim, for services to be rendered by the printer to the city, is a valid notice to the corporation. Decree of assistant vice chancellor reversed, an account ordered, and decree for the plaintiff for the amount found due, with costs.

Alexander C. Barry ads. *Voir Clirehugh.* The rule, that a bond given in restraint of trade is void, does not apply to a bond given by one who has pirated on a patent right to the patentee, conditioned that he will not, during the continuance of the patent, manufacture or vend in any place the patented article, or any thing in imitation thereof.

Craig & Dellicker v. *Samuel Cockroft.* A note promising to pay a certain sum "for value received, according to certain articles of agreement," is a valid promissory note, not payable on a contingency, or out of a particular fund; and the words "according to certain articles of agreement," relate merely to the consideration going to show the nature of the value received, and do not relate to, or in any way qualify the promise to pay, which is absolute of itself.

Jeremiah M. Wardwell, ads. *Thaddeus A. Lawrence.* In an action by the lessee against the lessor, for breach of the contract of letting, in not permitting him to take possession pursuant to the lease, it is not competent evidence in respect to the damages that the lessee had been offered a certain sum for his lease.

Jacob Acker, sheriff, v. *Susan Ledyard.* A plea to an assignment of errors, which avers only evidence of a fact and not the fact itself, cannot require from a replication thereby, any more than a denial of the averment.

McCullough and Weeks v. *William Cox and others.* A contract of letting having been executed by the lessees entering into possession and occupying under the lease, a breach on the part of the lessor of a covenant to repair, is not in bar, but only a recoupment of damages. Recoupment cannot be pleaded, but is available only on notice thereof, which notice is not a notice under the statute as a substitute for a plea, but a notice to apprize the opposite party of the character of the defence relied on.

Abraham Higbie ads. *Jotham C. Meeker.* The payee of a note being indebted, applied to his creditor to loan him on the note less than its face, the note to be left as collateral security, on a promise by the payee

that when he repaid the loan and redeemed the note, he would also pay something on his former debt. *Held*, that this was not a usurious agreement, and the holder of the note was entitled to recover thereon the amount which he had advanced, with interest.

John Bacon v. *William H. Townsend.* In an action for malicious prosecution, for being arrested on a charge for a felony, the mere fact that the accused was discharged from the recognizance given by him on his arrest, is not a termination of the prosecution so as to warrant this action.

The question of probable cause, where there is no dispute as to the facts, is a question of law for the court to determine; and in such case it is competent for the court, at *nisi prius*, to order a nonsuit, on the ground that there was no want of probable cause.

Dunham & Browning v. *Mellen, Hedges, and others.* Where the owner of a vessel has executed a bill of sale, and delivered to the vendee possession of the vessel, but the bill of sale is left in escrow until the vendee should complete his payments, which are never completed, and the vessel, for default thereof, returned to the possession and ownership of the vendor. *Held*, that the vendor is not liable for repairs put upon the vessel by order of the vendee, during the time she was then in possession of the vendee, and the bill of sale remained in escrow.

George Lovett ads. *German Reformed Church.* The court of chancery has power to set aside a judgment of a court of law, in a proper case, on the ground that it is a cloud upon the plaintiff's title. Where certain persons had obtruded into the government of a church, by usurping the situation and power of the trustees thereof, and during such usurpation had confessed a judgment binding on the real estate of the corporation, and there was no power in the court of law to afford relief, the jurisdiction of this court will be exercised.

Andrew S. Garr v. *David Selden.* Words imputing to a professional man want of skill or ignorance in a particular case, are not *per se* actionable. To be so, they must have been spoken of him generally. But words imputing want of integrity are actionable *per se*, whether spoken of him generally, or in reference to a particular transaction.

Where the words imputed are declared on as having been uttered under circumstances which might render them privileged, they will not be so held on demurrer, where the declaration also avers that they were used maliciously, and were not pertinent to the matter in issue.

Robert Prince ads. *Joseph Doncourt.* In a case where goods are left with a party, under circumstances which do not necessarily imply a right to claim compensation for storage, if, upon a demand of the goods, the party having possession absolutely refuses to deliver them, without saying any thing about his claim to storage, he will be regarded as having waived his claim. It is only in cases where the right to compensation for storage is a matter well understood by both parties, such as warehouse keepers and the like, that such a refusal would not be a waiver.

Lucien Tuffs impl'd, &c. ads. *E. B. & J. Armstrong.* When a party rescinds a contract of sale, on which promissory notes have been given, he need not make a formal tender of the notes before suit brought,

if he has otherwise signified his recision of the contract. It is enough that he is then able to restore the other party to his former condition, and on the trial produces and offers to cancel the notes.

Felix Quin v. *Abel Wheaton, Jr.* Where two statutes are enacted on the same subject at different times, the latter does not repeal the former, unless expressly so declared, or unless they are so inconsistent with each other that both cannot operate; and where a statute confers on a municipal corporation certain powers, it confers, also, all the authority necessary to the execution of those powers; as, where authority is given to restrain cattle from running at large, by impounding them, there follows with it the authority to establish and regulate pounds.

George Miln ads. *The Public Administrator.* Freight is earned only by delivery at the port of destination, and such delivery is a condition precedent to entitle the owner of the vessel to freight. Hence, where the owner died during the voyage, and the voyage terminated after his death, the freight might be recovered by his administrator, either in his own name or in his representative character, and the consignee could not set-off against the freight a demand owing to him from the owner, because the Revised Statutes allow a set-off where both claims are owing during the lifetime of the deceased.

Isaac Newton v. *Anthony Vanderslice.* On a contract to tow a canal boat from New York to Albany, or so far as the ice would permit, the steamboat owner was bound to take the boat through, unless physically prevented by the ice, and was bound to take this boat through if other boats were taken through. In such case, the damages would be such as would naturally flow from the injury sustained.

On such a contract, it is no excuse for omitting to take the boat on, that the captain of the steamboat feared injury to the canal boat. That was entirely at the risk of the owners of the canal boat.

And if the ice temporarily prevented the performance of the contract, it was the duty of the steamboat owner to perform his contract at the earliest moment that such temporary obstruction should be removed.

In such case, the loss of a possible profit arising out of a return freight cannot be estimated in the allowance for damages.

Gould & Banks v. *Bowne & Jones.* A chattel mortgage, when not filed in the county where the mortgagor resides, and when not renewed as provided in the statute, at the end of a year, is absolutely void as to creditors of the mortgagor, notwithstanding such creditor had actual notice of the existence of the mortgage and of the sum due thereon.

Harlem Railroad Company v. *Minott C. Story and others.* On a contract to construct a part of the road of the railroad company, the contractors had sub-contracted all the work. In a suit against the company for damages for stopping the work, the difference between the contract price and the price to be paid to the sub-contractors is not the true rule of damages, nor ought evidence of such difference to have been received, because such rule and evidence have reference to the state of things at the time of the completion of the contract. Whereas the true inquiry is what the damage was at the time of the breach.

John Andaries and others, executors, v. *Jonathan Wilt and others.*

Where a testator gave certain legacies to his children, deducting from each such advances as he had made to them in his lifetime, and the executors, in their inventory, had included the amounts of such advances as assets, the executors were entitled to an allowance to the amount of such advances on a final accounting, such sums having been erroneously treated by them as assets, whereas under the will they were strictly advances by the testator. The executors are not estopped by their inventory from showing that the sums entered thereon were so entered by mistake, and were not assets in their hands.

James Monroe and wife v. *George Douglass and others.* The property in dispute being in Scotland, is governed by the laws of that country, and the question involved having been passed upon by the courts of Scotland in a manner which is certified to this court to have been in conformity with those laws, this court will not renew that determination, or entertain the question of its accuracy. And the question whether the parties properly appeared in the suit in Scotland, having in like manner been determined by those courts, will not now be entertained by this court.

Daniel McLaren v. *Hartford Fire Insurance Company.* Where a mortgagor had procured an insurance against fire, and had assigned the policy to the mortgagee as collateral security, and the property had been sold on a foreclosure of the mortgage, on which sale it did not produce enough to pay the amount due, a fire then occurring. *Held*, that the insurable interest had expired, the interest of the mortgagor being merely in the surplus after paying the mortgage; and the sale being subsequently completed, it makes no difference that, at the time of the fire, the deed on the sale had not been delivered.

Charles H. Marshall and others v. *Thomas Garner and others.* To entitle a party to contribution for general average, he must voluntarily have placed the property, ship or cargo — in respect to which the average is claimed — in peril, and where a ship is stranded, under circumstances which cause her to become, finally, a total wreck, a cutting away of the masts, after the stranding, whereby the saving of the cargo may be facilitated, is not a voluntary sacrifice of the ship, or any part of her.

It seems now to be finally settled, that general average may be claimed where a ship is voluntarily stranded, though she be not afterwards recovered, but be totally lost.

Archibald R. Bogardus v. *Maria S. Bogardus.* The testator made a will in 1814, and died in 1841, seized of certain real estate which he purchased in 1825. The devise was of "all his estate, real and personal, of what kind or nature soever the same may be." Held that, under the revised statutes, the real estate above mentioned passed under the will.

Henry Sherman and wife v. *Michael Burnham and others.* In a suit brought by husband and wife, touching her separate estate, held in trust for her, praying an account thereof, and a distribution by the trustees. The suit is the husband's suit, and the wife will not be bound by the decree, unless she be made a party to it by her next friend, and independently of her husband.

Where the wife's interest is an estate for life, and there is a remainder over in fee to her children, a child in esse must be made a party, where

the suit asks an account, such suit being in fact for the execution of the trust.

Where, in such suit, an account is asked of all her and her child's share of the testator's property, his executors must also be made parties, though they were also trustees for the wife.

David Leavitt, receiver, v. *John B. and V. De Launay.* An answer to the charging part of a bill is responsive, and must be taken as true, unless overthrown by evidence.

Where a bill avers that certain assets are held under a particular agreement, describing it, and charging it to be usurious, and the answer—responsive, avers that they held under another and different agreement, which the bill does not aver to be usurious, the allegation of usury must fail.

George Kelsey v. *George Griswold.* In trover, the statute of limitations begins to run from the conversion, and not from the time of demand and refusal, unless such refusal be in itself a conversion, and not mere evidence of it.

Where there has been a conversion, by turning the thing into money and appropriating the avails to the wrong doer's own use, or by refusing to deliver on demand more than six years before suit, a fresh demand and refusal within six years, will not take the case out of the statute.

When two of three partners have been declared bankrupt, and their interest in certain partnership assets have passed to their assignee: *Quære*, Does not the ownership in such assets survive to and vest in the solvent partner, and can any suit be brought by such assignee to collect such assets, at least without joining such solvent partner?

James Harriot v. *Abner Sanford.* Where an agent for the collection of rents employs a constable to execute a distress warrant, such constable is a competent witness for the agent in a suit brought against him by the landlord for the negligence of such agent.

P. & M. Poillon ads. *S. & C. Knowles.* The incompetency of the payee to be a witness, by reason of his implied warranty, that the note is not a forgery, is confined simply to the question of execution, and the execution being established, he is competent to show that the note is not usurious.

Samuel Bowne v. *Daniel S. Hyde.* The maker of a promissory note which has been endorsed for his accommodation, is not a competent witness for the endorser, because he is bound to indemnify him for the costs of the suit, and though as to the face of the note, his interest is balanced between the holder and the accommodation endorser, his liability to the latter for the costs of the suit, disqualifies him as a witness.

The attorney on the record, cannot release a witness for his client, without a special power for that purpose.

John Hook v. *John Gray.* An illegal contract existing between the parties to share the fees of an office, a subsequent and collateral agreement to pay the costs of a suit brought to try the title of the office, not founded solely on the illegal contract, but upon other considerations, may be enforced in a court of justice, otherwise, if the agreement was directly connected with, or had its consideration solely in the original illegal act.

Samuel Myers ads. *Spear & Ripley.* Receiving a note in payment of a

precedent debt, as where a receipt was given, and the account was balanced, does not constitute the parties holders for a valuable consideration, so as to be unaffected by a misapplication of the note, and to entitle them to detain it from the rightful owner, no value having been paid for it, and no securities given up.

W. F. Baker's executors v. *Peter Lorillard, Jr.* Where two tenants in common in certain lands, severally devised their interest therein to tenants for life, with remainders over to their issue, and remainder over on failure of such issue, and the life-tenants, after the death of their respective testators, made voluntary partition, and one tenant for life, on application to the court of chancery, sold his moiety, and invested the proceeds, which were enjoyed by him during life, and by the remainder man after his death, and the other tenant for life became seized in fee by inheritance from the remainder man of that moiety. *Held*, that the partition had been ratified and should stand effectual.

Platt K. Dickinson v. *Thomas Phillips and others.* An agreement to pay certain debts out of a particular fund, without any words of transfer, and without any power or authority to receive or collect the fund, cannot be construed to give the creditors a specific lien on the fund, or be enforced as an equitable assignment.

The true test in such case is, whether the party having the control of the fund intends in fact to make an absolute appropriation of it, or himself to retain the control of it.

Moore v. *Fry & Newman.* Where, in an answer to a complaint for a foreclosure of a mortgage, the defendant, who is an assignee of the mortgaged premises, merely avers that he has been informed there is a defence to part of the claim, but does not make oath to his belief of the truth thereof, and does not offer to pay what is really due, and the affidavits on the other side show the real indebtedness, and repeated promises to pay; the answer may be stricken out as a sham defence.

Hudson River Steamboat Company v. *Isaac Newton and others.* The mode of reviewing the order of a single judge, either at chambers or at special term, is in all cases by appeal, except only in cases of special motions, in cases pending on the first of July, 1847, which are to be reviewed by a rehearing pursuant to the provisions of the judiciary act.

New York Equitable Insurance Company v. *Carpenter.* Sales for assessments for city improvements do not take precedence over prior registered mortgages, unless the purchaser at the assessment sale give notice thereof to the mortgagee, within eighteen months after the sale, and the mortgagee neglects within six months thereafter to pay the amount bid on such sale with interest.

Valentine G. Hall v. *John Tonnele.* Where the testator had signed his name to his will, and annexed to it a map as a schedule which he had not signed. *Held* to be a valid execution of the will.

Where three persons subscribe as attesting witnesses, and one of them becomes incompetent by reason of interest, it will be sufficient if the execution be duly proved by the remaining witnesses.

Rebecca Ann Wilson v. *Alfred J. Cipriant.* Where the testator had

signed his name to his will, he added a request to his executors, in his own hand-writing, which he also signed, and the attesting clause was written and signed by the witnesses below both. Held to be a good execution of the will.

Where the testator, instead of signing the will, in the presence of the witnesses, acknowledged his signature in their presence, and the will was otherwise duly executed, it is no objection that the attesting clause says it was "signed, sealed," &c., instead of saying it was "acknowledged," &c.

Dennis McCarthy v. *Preston H. Hodges and others.* The certificate of final naturalization given by a court of competent jurisdiction, is conclusive, and cannot be impeached in another court by inquiry into the regularity of the proceedings.

The provision of the revised statutes, declaring that the alienage of an ancestor shall not preclude a party from inheriting, refers to lateral as well as lineal ancestors.

Abstracts of Recent English Decisions.

Vice Chancellor Wigram's Court.

Meaden v. *Sealey*, April 3, 1849. *Receiver appointed before appearance.* Where a case of injury was disclosed by the affidavits in support of a motion by an equitable mortgagee for a receiver, the court made the order, although the defendant had not appeared, and no injunction was asked. See *Tanfield* v. *Ervine*, (2 Russ. 149;) *Coward* v. *Chadwick*, (2 Russ. 150;) *Gibbins* v. *Mainwaring*, (9 Sim. 77;) *contra*, *Ramsbottom* v. *Freeman*, (4 Beav. 145.)

Phillipson v. *Galty* — *Galty* v. *Phillipson*, November 7, 1848. *Breach of Trust — Inadequate Security.* The trustees of a sum of stock were empowered by the settlement to invest the trust fund in government or real securities. They, with the sanction of one of the *cestuis que trust*, sold out part of the stock, and lent the proceeds to another *cestui que trust*, upon his personal security. The trustees were held liable to replace the stock sold out, but were allowed an indemnity with regard to the sum advanced, out of the interest in the trust property of the *cestui que trust* receiving and sanctioning the advance. A power given to trustees to invest on government or real security, was *held* not to authorize a loan by the trustees of a part of the trust fund on the security of freehold houses in a town, the value of which depended upon their situation, and was besides liable to be diminished by the effects of covenants relating to other premises which were let with them.

Vice Chancellor Knight Bruce's Court.

Salmon v. *Gibbes*, February 16 and 17, 1849. *Appointment — Fraudulent Exercise of Power.* A party entitled to the dividends of stock for life, with power of appointment over the capital among her children, in such shares as she should by deed or will appoint, appointed by deed all but a small sum to one of her two only children absolutely, subject to her own life interest. On the following day, the appointee, with a view to defeat any interest the husband of the other child of the appointor might take, settled one-half of the capital, subject to the life interest, upon her sister for life, for her separate use, and afterward for her children absolutely. On a bill filed by the husband, the transaction was set aside, and a reference directed, to approve of a proper settlement on the wife.

Rolls Court.

Burrell v. *Baskerfield*, March 16, 1849. *Construction of Will — Conversion — Gift to Class.* A testator gave a legacy of £200 to each of his twelve first cousins, (naming them;) and then, noticing that one was dead, he gave the legacy intended for him to his children. He gave his wife a life interest in his residuary real and personal estate, to be enjoyed in specie; and from and immediately after his wife's decease, he gave his executors full power to collect all his property together, and sell the houses and other estates, and to convert into money all his funded property, and then to pay first certain legacies, and then the whole of the remainder of his property was to be divided, share and share alike, among his aforesaid twelve first cousins and their children. By a codicil, he took away the legacy given by his will to his cousin Mrs. B., but expressed his intention not to exclude her children from the benefit she might thereafter possess in the final division of his property after his wife's decease. *Held*, that there was a conversion of the real estate out and out. *Held*, also, that the cousins who survived the testator took vested interests absolutely, subject, as to those who died leaving issue, to be diverted for the benefit of their children, by way of substitution. *Held*, also, that the children of the cousin alluded to by the testator as already dead were entitled to a twelfth share of the residuary estate, as representing such deceased cousin. 13 Jur. 311.

Attorney-General v. *Shield*, March 14, 1849. *Practice.* It is irregular for a defendant in contempt, for want of an answer, to file a demurrer and answer; and a plaintiff, by taking an office copy thereof, does not waive his right to have it taken off the file for irregularity. 13 Jur. 330.

Court of Queen's Bench. Sittings in Banco after Trinity Term.

Gardner v. *Slade et ux.*, June 14, 1849. *Slander — Evidence — Malice — Privileged Communication — Character.* In an action for slander of

the plaintiff, in her character of a domestic servant, the plaintiff proved, that, having lived for some time with the defendant, she changed service upon a character given to her by the defendant: that, some time afterwards, the defendant's wife, in a letter to her new mistress, alluded to the plaintiff, and to the character first given of her as being unmerited: that thereupon the new mistress requested further information, and was told, by the defendant's wife, that she had discovered, since the time of the giving of the first character, that the plaintiff was dishonest: — *Held*, that there was no evidence to be submitted to the Jury of malice in the defendant's wife, and that the communication was privileged.

If a servant obtain a place upon the strength of a character given by his master, and the master afterwards discovers circumstances which induce him to believe that the character was undeserved, he is morally bound to inform the new master of those circumstances, and the communication made concerning them is a privileged communication. 13 Jur. 826.

Court of Common Pleas. Michaelmas Term.

Alexander v. *McKenzie*, November 20, 1848. *Bill of Exchange — Indorsement per Procuration — Agency.* An indorsement "per procuration" imports that the indorser acts under a special authority; and the person who takes a bill so indorsed does it at his own peril. He is bound to satisfy himself as to the extent of that authority. 13 Jur. 346.

Sittings in Banco after Michaelmas Term.

Benett v. *Peninsular and Ocean Steamboat Company*, December 6, 1848. *Common Carrier — Pleading.* The declaration stated that the defendants were common carriers of passengers for hire from Southampton to a place beyond the seas, viz., Gibraltar, in Spain. Plea, that the defendants were not common carriers of passengers for hire, *modo et formâ*. *Held*, that this plea only put in issue the fact of their being common carriers of passengers for hire between Southampton and Gibraltar, and not their liability to carry by the custom of England. 13 Jur. 347.

Court of Exchequer.

Townsend v. *Deacon*, April 27, 1849. *Statute of Limitations — Party Abroad — Executors.* A party, whether Englishman or a foreigner, to whom a cause of action accrues while abroad, has always the right of action in him while he continues abroad, and if he dies abroad, his execu-

tors may sue for it, although more than six years have elapsed. *Sed quære*, whether under such circumstances the executors are not bound to sue within six years after his death. 13 Jur. 366.

Prerogative Court.

Matson v. *Magrath*, March 21, 1849. *Revocation.* A testator, dangerously ill and unmarried, made a will in favor of an intended wife. He recovered, was married, and had issue of the marriage four children, who, with the wife, survived him. He carefully preserved the will, and recognized it, but never re-executed it. *Held*, that the will was revoked.

In the goods of W. Reeve, April 19, 1849. *Erasures from Will—Parol Evidence.* Words had been erased from a will, and others substituted which could not take effect. *Held*, that parol evidence was admissible to prove what the original words were. 13 Jur. 370.

Notices of New Books.

REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW YORK; FROM JANUARY TERM, 1799, TO JANUARY TERM, 1803, BOTH INCLUSIVE; TOGETHER WITH CASES DETERMINED IN THE COURT FOR THE CORRECTION OF ERRORS, DURING THAT PERIOD. By WILLIAM JOHNSON, Counsellor at Law. Legum interpretes, judices, legum denique ideirco omnes servi sumus, ut liberi esse possumus. Second edition; with many additional cases not included in the former edition, from the original notes of the late Hon. JACOB RADCLIFF, one of the judges of the Supreme Court during the time of these Reports. With copious notes and references to the American and English decisions. By LORENZO B. SHEPARD, Counsellor at Law. Volume III.; containing the cases from January Term, 1802, to January Term, 1803, inclusive; with an Appendix. New York: Published by Banks, Gould & Co., Law Booksellers, 144 Nassau Street; and by Gould, Banks & Gould, 104 State Street, Albany. 1849.

The third volume of this valuable series is greatly enriched by the addition of many cases not included in any former edition, selected from the manuscript notes of the late Mr. Justice Radcliff. These notes comprise very brief abstracts of decisions during the years 1794—1805. They are somewhat imperfect, but nevertheless contain much that is interesting and valuable.

A SUPPLEMENT TO HARRISON'S ANALYTICAL DIGEST; CONTAINING A DIGEST OF ALL THE REPORTED CASES DECIDED IN THE COURTS OF

EQUITY, COMMON LAW, ADMIRALTY, AND THE ECCLESIASTICAL COURTS; AND BY THE LORD CHANCELLOR OF IRELAND, IN THE YEARS 1846, 1847, AND 1848. By R. TARRANT HARRISON, Esq., of the Middle Temple. Carefully arranged by a member of the Philadelphia Bar. Volume VI. Supplement, Vol. II. Philadelphia: Robert H. Small, Law Bookseller, 25 Union Street. 1849.

Through an inadvertence which we very much regret, we failed to notice this work as we should wish to have done in our last number. It is a very valuable publication. The abstracts of cases are briefly, but very carefully stated. They are cited chiefly from *The Jurist*, *Law Journal*, and *Cooper's Reports*, and comprise, as stated in the title-page, the decisions of all the principal courts of England, during the three years, 1846, 1847, 1848. It will thus be seen that it is the only work, now published, which will give to the American lawyer a complete record of the English decisions to the close of the last year.

Miscellaneous Intelligence.

RIGHTS OF INSANE PERSONS. — We republish the following article from the Legal Observer, (London,) for the benefit of those interested in the case of *Nottidge* v. *Ripley*:—

The Lord Chief Baron and the Lunacy Commissioners. — As stated in the postscript to our last number, the commissioners in lunacy have deemed it expedient to address a letter to the lord chancellor, with reference to their duties and practice, under the 8 and 9 Vict. c. 100, in consequence of certain observations not altogether of an extra-judicial character, which fell from the lord chief baron, upon the trial of a case of *Nottidge* v. *Ripley*, which occupied the court of exchequer at nisi prius for three days at the sittings after Trinity term last, and attracted considerable attention, from the singularity of the circumstances disclosed by the evidence of the witnesses. The commissioners' letter was called for by an address from the house of commons, a few days before the sessions closed, returned pursuant to such an address, and has thus become a public document.

Few of our readers will probably have forgotten, that '*Nottidge* v. *Ripley*,' was an action brought by a maiden lady, of mature age and independent fortune, against her brother and brother-in-law, for forcibly taking her from a village in Somerset, where she was residing, and confining her in a private lunatic asylum in the vicinity of the metropolis, for a period of about fifteen months. Miss Nottidge, it was admitted, had not exhibited any symptoms which rendered her dangerous to herself or others, but entertained very peculiar religious notions in common with two of her married sisters, and several other persons, who formed a species of religious

community, and resided in a building on which its inmates bestowed the somewhat equivocal title of the "Agapomone," or "Abode of Love." The attention of the commissioners in lunacy was especially directed to the case of Miss Nottidge, very soon after she was confined in the private asylum. She was seen and conversed with, by more than one of the commissioners, on several occasions, and a majority finally came to the conclusion that she might be safely discharged. There was no commission *de lunatico inquirendo* in Miss Nottidge's case, but she was detained for the period already referred to, under the authority of the preliminary order and certificates prescribed by the act 8 and 9 Vict. c. 100. The order was signed by one of the nearest relatives of the lady, and there were certificates from two medical practitioners of respectability, who had examined the patient separately, and a third from the medical officer of the establishment in which she was confined, all of which concurred in stating that in the judgment of the parties signing these documents, Miss Nottidge was of unsound mind, and a proper subject for confinement.

Under these circumstances, the chief baron was understood to have expressed an opinion, that as those who caused the plaintiff to be confined, did not act under the authority of a commission, finding her to be a lunatic, they could not be said to have had "the sanction of the law," and that generally, no person ought to be confined in a lunatic asylum "unless dangerous to himself or others." The commissioners in lunacy contend that great evils would result to society from the acceptance and adoption of the chief baron's opinion as a practical rule, and their letter to the chancellor, which is signed by Lord Ashley, as chairman, and countersigned by the secretary, contains a temperate vindication of their own conduct, and of the principles which have governed them in the exercise of their functions, and an elaborate attempt to prove the unsoundness of the dicta which fell from the chief baron on the trial in question.

With reference to the supposed necessity of a commission, in order to give the confinement of an alleged lunatic the sanction of the law, the commissioners lay it down:

"That proceedings by commission are, generally speaking, advisable only where the insanity is likely to be of a permanent character, and the property of the lunatic is of such a nature as to require them, and of an amount adequate to meet the expense, always considerable, and, when the commission is contested, frequently very large.

"Wherever a reasonable hope of recovery exists, and the income of the lunatic can, in the mean time, be properly administered for his benefit without a commission, the general practice amongst the friends and relatives of the insane, is to avoid resorting to proceedings which shall entail unnecessary cost, which, by the disclosures they occasion, are most painful to the feelings of the family, and which, by the excitement they produce, are sometimes injurious to the patient himself.

"It is obvious that the finding of a jury is in no case essential, in order legally to justify the confinement of a person of unsound mind. In fact, out of 4,028 private patients, (many of them possessed of considerable property,) who were confined in asylums on the 1st January, 1842, only 245 had been found lunatic by inquisition."

These observations of the commissioners, although conclusive as to the practice, leave the question as to the expediency of allowing any person to be confined in a lunatic asylum, without previous investigation by a

responsible public tribunal, precisely as it stood before. The remarks of the commissioners upon the legality and expediency of detaining in lunatic establishments, persons who, so far as their acts are concerned, may be considered harmless, are better deserving of attention, and more likely to influence the public mind. The word "lunatic," is defined in the act 8 and 9 Vict. c. 100, s. 114, to mean "every insane person, and every person being an idiot, or lunatic, or of unsound mind," and in this act, as well as in the county lunatic asylums' act, (8 and 9 Vict. c. 126,) dangerous lunatics are referred to, as forming part *only* of the body of insane persons to be subjected to confinement and proper treatment. Upon this part of the question, the letter of the commissioners thus proceeds: —

"If, in practice, the class of insane persons placed in confinement were limited to such as had previously exhibited some dangerous tendency, the main purpose of the legislature, in the statutes now in force, would be frustrated, and a most fearful hazard be incurred. For, inasmuch as the tendency to danger first shows itself more frequently in the latter than in the earlier stages of the disease, when alone such disease is likely to be cured, a large proportion of patients of this class would be deprived of the benefit of proper curative treatment until after they had placed either themselves or other persons in peril, and had not improbably (owing to the lapse of time) become themselves incurable.

"Moreover, the difficulty of ascertaining whether one who is insane be dangerous or not is exceedingly great, and in some cases, can only be determined after minute observation for a considerable time. . . . . .

"In respect to pauper lunatics, it has already been the subject of almost universal complaint, that the number of such lunatics has been multiplied, and the country burthened to a prodigious amount, because the poorer class of lunatics have been allowed to remain at large, or kept in workhouses, deprived of that medical treatment which a lunatic establishment, properly managed, is best calculated to afford, until their malady has become incurable.

"The misery to lunatics' families, and the great cost to the various parishes and counties consequent on this course, it would be difficult to exaggerate.

"In regard to private patients, if not placed for cure or care in some lunatic establishment, they must be kept at home under every disadvantage to themselves, and be the cause of great and unnecessary expense, and of inexpressible annoyance to their families. The first, and an essential proceeding with a view to cure, is, generally, to detach the patient from the scenes and associations in the midst of which his disorder has arisen. If he were to remain at home, this could not be effected. . . .

"Again, the habits and general conduct of patients under the influence of mental disease, are frequently so violent, and at times so offensive, that it would be to the last degree cruel and unjust to expose the other members of the family to them; more especially where there are children, whose minds might receive a shock, and perhaps be incurably injured, by continually witnessing the paroxysms or maniacal extravagances of a lunatic. Equally unjust would it be to suffer the infirmities of the patient himself to be exposed to the gaze of all the members of the household, and, in many cases, to the notice and comments of the neighborhood and of strangers. There are cases of insanity, as your lordship is aware, in which the most distressing symptoms appear, in which the character of the individual for a time becomes altogether distorted; his habits filthy; his expressions and general conduct disgusting. There are also cases of females, suffering under a form of mental disorder well known to the medical profession, in which, from disease, not only the words, but the actions also of the patient become absolutely uncontrollable, where the original and real character is, for a time, altogether subverted, and all modest restraint and decency are abandoned. The want of moral control, indeed, is one of the most common symptoms and indications of insanity; and the actions and expressions of a large number of patients, suffering, at certain periods, under maniacal excitement, are of such a nature,

that it becomes an imperative duty to protect and shield them from observation as much as possible. The privacy indispensable in cases of this sort can only be properly afforded in houses adapted for the purpose of receiving lunatics, who, there at least, are secluded from the observation of all persons except those under whose care they are immediately placed, and are generally exempted from the mechanical restraint or coercion of the person which, if they were confined at their own homes, must frequently be inevitable."

The following statement, in the letter of the commissioners, will go far to allay the jealous suspicion which a hasty consideration of the case of "*Nottidge* v. *Ripley*," might have excited, as to the possibility of a person *not* insane being compulsorily detained in a lunatic establishment, upon the ground that he entertained certain opinions on religious or political subjects, which a majority of the community might consider extravagant and unreasonable: —

"In the majority of cases which come under the cognizance of the commissioners, they have little difficulty in satisfying themselves as to the state of mind of the patient; but cases of nicety and difficulty occasionally arise, exhibiting such peculiarities, and differing so decidedly in some respects from all others, that the commissioners, in dealing with them, have been unable to lay down any general rule or principle for their guidance. *In no case have they decided that opinions, however wild or extravagant, which were common to any class or body of persons, either in reference to religious belief or otherwise, constituted or amounted to insanity.* And in no case have they decided that a patient was insane, because his symptoms resembled, in a greater or less degree, those of other patients whom they have previously known; but they have considered each individual case as depending upon its own special circumstances, and have formed their judgment accordingly."

If a patient be placed in an asylum without having been of unsound mind, or if a patient, (originally a fit subject for confinement,) be restored to a sound state of mind, it is distinctly admitted to be the bounden duty of the commissioners to discharge him; but other circumstances constantly arise in which a duty of equal delicacy and responsibility is thrown upon the commissioners, and in which much must necessarily be left to their discretion. The principles upon which that discretion is exercised in such cases, are thus stated in the letter before us: —

"Under peculiar circumstances, where, after sufficient observation, a patient, although of weak or unsound mind, appears to be perfectly harmless, the commissioners frequently promote his liberation, if he have a comfortable home, or any friends disposed to receive and protect him and his property from injury; but, where this is wanting, the commissioners do not think themselves justified in removing the patient from the shelter of an asylum, and leaving him at large and unprotected. They consider it to be quite clear that they are not bound, as a general rule, to speculate upon the chance that a patient who, in their opinion, is still insane, will be perfectly harmless if at large, and therefore to liberate him accordingly.

"The person signing the order for a patient's confinement (generally a relative or friend) not unfrequently, indeed, takes upon himself the responsibility of liberating a patient whilst still under a delusion, and before recovery, and the commissioners have no right, and never attempt to interfere. The consequence of the premature discharge of a lunatic patient, however, is frequently a relapse, and should as much as possible be avoided."

The above extracts sufficiently indicate the scope and objects, as well as the style and spirit, in which the commissioners' letter is framed. The subject is of still greater importance, perhaps, in a social than in a legal

view.* We should have been better pleased if the discussion had not assumed the character of a commentary upon observations falling from a learned judge at nisi prius. A reply in such a shape is always inconvenient, were it only because the judge is precluded from entering the field of controversy, and justifying and maintaining the opinions to which he has given utterance from the bench. On the other hand, it must be admitted, that the efficiency of a public board, constituted like that of the commissioners in lunacy, and invested with duties of so grave and delicate a nature, depends mainly upon its members being able and willing, upon every occasion, to enter into an explanation of their official conduct, and to prove themselves entitled to the public confidence."

Sergeant Talfourd's Appointment. — The elevation to the bench of a lawyer, distinguished as well for his successful cultivation of literature, as for his professional knowledge, is to the profession and the public much more than a mere act of judicious and deserved selection of a public officer: it is a manifestation of change in public opinion in a healthy direction. Time was when any man, applying himself to the law as a profession, felt it incumbent on him, if he had been so rash as to cultivate science or literature, not merely to abandon such pursuits, but formally and ostentatiously to publish such his renunciation; for it was concluded, that, unless the lawyer expelled from his mind every thought save of law, he could not be a lawyer. If the function of a lawyer consisted merely in his head being a storehouse of law, a sort of legal dictionary, whereout law is to be picked by another hand, guided by another intellect, there might be some soundness in this opinion. But such is not the function of a lawyer: his business is not merely to know the law, but to do that much more difficult thing, to perceive and explain correctly its application to the ever-varying circumstances that exist in the business of the world. A mere lawyer is, for all purposes of business, almost useless.

Then, if that be so, the question is, how are the qualities that are essential to the formation of the accomplished and practically useful counsel best acquired and strengthened? Judgment, knowledge of mankind, clearness of apprehension, and perhaps, above all, the faculty of expressing with the lips, not only with clearness, but with persuasive influence, that which the mind comprehends — these are among the essential qualities of the counsel and advocate. How are they best acquired and strengthened? Is it by a sickening devotion to the single pursuit of legal knowledge — by storing the memory till it is overloaded with legal reading, and exercising only those functions of the intellect which are called into play by purely technical disquisitions; or is it not rather by supplying the mind from time

* The number of persons admitted between the 1st January, 1846, and the 31st December, 1848, into the various lunatic asylums in England and Wales, excepting Bethlem Hospital, and the naval and military lunatic hospitals, which are not under the jurisdiction of the commissionsers in lunacy, is thus stated in the last return of the commissioners: — "Private asylums: males, 2,171; females, 2,468. Pauper asylums: males, 6,155; females, 6,344. Total of patients, 17,838. Discharged *cured*: private, males, 1,103; females, 1,032; pauper, males, 1,921; females, 2,281. *Died*: private, males, 530; females, 363; pauper, males, 2,146; females, 1,672.

to time with fresh ideas, fresh objects of thought — studies which, being a change, invigorate and refresh, while they inform and enlarge? Can any man say that he will read one of the higher poets, or, if science be to his taste, that he will possess himself of the knowledge of any branch of it, and not by such intellectual exercise so strengthen his general faculties, so enlarge his circle of thought, that he will be, not a more learned, but a better lawyer — better in the sense, that what learning he possesses he will better wield; that what opinion he can form he will better express? If the matter rested upon reasoning, the conclusion would, we think, be clear, that, provided a man does not so spread and extend his pursuits as to fritter away his mental strength, by passing from subject to subject without possessing any, the greater the extent of his general knowledge — the greater the polish of his mind, by the pursuit of either art or literature, the more accomplished, the more useful will he be as a lawyer. But this conclusion does not rest on reasoning alone: it is supported by facts.

Of that class of our lawyers who have been almost what are termed "black letter lawyers" — learned lawyers, par excellence — none, for instance, have been more learned, none more practical, than Butler and Fearne; yet both of these men were cultivators, almost to devotion, of other pursuits besides law — Butler in the field of literature, especially of ecclesiastical literature; Fearne in that of practical mechanics. The names of Lord Mansfield and Lord Stowell are familiar as those of men of whom it is historical, that their cultivation of various branches of knowledge came in aid of their reputation, and, we doubt not, of their capacity, as lawyers; and to these might be added numerous names among the living. To one, at least, that of Lord Jeffrey, it may be permitted to refer.

We look, then, upon the elevation of the recently-appointed judge as a proof that the government of the country has perceived a change in public opinion; that it is not afraid to make a man a judge because he has been an open worshipper at the shrine of literature; and we trust that there is, in fact, such a change in public opinion, and that henceforth lawyers may show that they are men as well as lawyers — may love something besides reports, and pleadings, and forms — may refresh and strengthen their minds and purify their tastes with the pursuits of art, or literature, or science, without it being concluded, that, in proportion as any thing else goes into their heads, law goes out. — *London Jurist, August* 4.

INTERNATIONAL LAW. — *In Chambers, before His Honor Mr. Justice* SMITH. — *United States of America* v. *George R. Holmes et al.* — This was an application by petition, to the judges of the queen's bench, on behalf of the United States of America and the President, soliciting an order to require the attendance of material witnesses, who had withdrawn from the jurisdiction of the court in which the suit is pending in the United States.

A commission of letters rogatory had issued from the circuit court of the second circuit of the United States, in the Vermont district, running in the name of the President, and tested by the chief justice of the supreme court of the United States, addressed to any judge or tribunal

having jurisdiction in civil causes at Montreal; requesting process to issue to compel witnesses to appear to be examined on the part of the plaintiffs, in order that their depositions might be taken and returned to the said circuit court. The writ contained an offer to do likewise for the courts in Canada in a similar case, when required.

The petition prayed that the judges would give effect to the commission or letters rogatory, and order the attendance of the witnesses, which order was requested with a view to obtain compulsory process against them should they refuse to attend.

On behalf of the application, the counsel cited Greenleaf on Evidence, vol. I. § 320, where the nature and purpose of such a writ are precisely described, and a form given in the notes similar to the one used in the present case; also the *nouveau denisart*, *verbo commission*, where it is mentioned that the courts in France not only conferred such authority on foreign tribunals, but accepted of and executed such commissions directed to them. Also the case of *Clay* v. *Stephenson* (7 Ad. & El. Rep. 185,) where letters rogatory had issued in the year 1837 from the court of queen's bench, at Westminster, to a court in Hamburg.

Ordered that the witnesses be required to appear as prayed for.—*Montreal Herald.*

Natural Justice of Capital Punishment. — The following communication has been received from a member of the bar in Arkansas: —

"The effect desired by the law to result from capital punishment, as I conceive, is to banish the offender forever from society; and this can only be done *completely*, per ordinem naturæ, by sending him out of the world.

I do not think, nor is it necessary to contend, that an individual, by the commission of any crime, — murder, for instance, — loses his right to *life;* but he most unquestionably thereby forfeits his right to *live in society.* Now when he, by his own act, is thus deprived of this right to live in society, what seems to be the punishment which natural justice would impose? Why, that the offender revert to his natural state; at all events, that he be driven entirely and perpetually from society and all its benefits. But his time spent in society, his habits formed in it, his character, which is the creature of the thousand imperceptible changes that the social state has wrought upon him, render his return to the natural state physically impossible, apart from the present non-existence of such a state or condition in the world. Still the ends of justice must be obtained, and the only way in which the above requirement, viz. the complete and perpetual banishment of the offender from society and all its benefits, can be accomplished at all, is by sending him out of the world. So that when the law takes from an individual his right to live in society, — which, in the case put, it demonstrably has a perfect right to do, — it must, in the arrangement of things, *ex necessitate*, deprive him of life itself, if the injunctions of natural justice are performed.

The only objection ever pretended to be urged against the above principle is this, 'Solitary imprisonment for life effects the end desired by the law; it banishes him forever from society.' But such is not the fact.

For all the while he thus lives in his solitary confinement, he draws that very life itself from the breast of society; she furnishes him his food, his raiment, protection from the elements, &c. &c.; and these are benefits which he has lost his right to receive at her hands. S. G. S."

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Alexander, John	Lynn,	Aug. 30,	John G. King.
Anderson, William	Methuen,	Sept. 6,	John G. King.
Archer, William, Jun.	Salem,	Aug. 17,	John G. King.
Barrett, Sherman,	Concord,	Sept. 13,	Asa F. Lawrence.
Clay, Henry J. et al.	Lawrence,	" 5,	John G. King.
Cook, Moody D.	Bradford,	" 17,	John G. King.
Dearborns, Charles A.	Danvers,	Aug. 8,	John G. King.
Dix, Joel H.	Somerville,	Sept. 21,	Asa F. Lawrence.
Egan, Sanford K.	Newbury,	Aug. 31,	John G. King.
Fales, Elisha F.	Wrentham,	Sept. 6,	Francis Hilliard.
Fowle, Joseph W.	Boston,	" 4,	J. M. Williams.
Gardner, Robert	Roxbury,	" 27,	Francis Hilliard.
Harrington, Antiphas, et al.	Braintree,	" 3,	Francis Hilliard.
Huckins, Samuel D.	Boston,	" 17,	J. M. Williams.
Keith, Robert	Boston,	" 20,	J. M. Williams.
Lamson, Thomas A.	Hamilton,	" 25,	John G. King.
Makepeace, William	Newton,	" 15,	Asa F. Lawrence.
Meserve, Charles	Boston,	" 25,	J. M. Williams.
Miller, Rufus K.	Lawrence,	Aug. 10,	John G. King.
Nichols, Howard	New Bedford,	Sept. 20,	David Perkins.
Norton, William G. et al.	Lawrence,	" 5,	John G. King.
Pitts, Amos W.	Blackstone,	" 3,	Henry Chapin.
Pratt, Nathan, et al.	Braintree,	" 3,	Francis Hilliard.
Presley, Alpha,	Dedham,	" 12,	Francis Hilliard.
Reed, Theodore	Boston,	" 29,	J. M. Williams.
Riley, Hazen K.	Boston,	" 19,	J. M. Williams.
Robinson, John	Charlestown,	" 12,	Asa F. Lawrence.
Robinson, Samuel	Raynham,	" 15,	David Perkins.
Sherman, George W.	New Bedford,	" 6,	David Perkins.
Sherman, Thomas	Dartmouth,	" 4,	David Perkins.
Small, Cyrus	Boston,	" 21,	J. M. Williams.
Stoddard, Leonard	Lawrence,	" 24,	John G. King.
Tidd, Joel S.	West Springfield,	" 19,	George B. Morris.
West, Henry N.	Somerville,	" 21,	Asa F. Lawrence.
Whipple, Alonzo B.	Southborough,	" 15,	Henry Chapin.
Whitmore, Stephen & Son	Salem,	Aug. 27,	John G. King.
Winter, Roland,	Barre,	Sept. 25,	Henry Chapin.
Wood, Jonathan B.	Braintree,	" 7,	Francis Hilliard.